Competition Bureau
Merger Review Benchmarking Report

June 28, 2001

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Executive Summary

In the mid-1990s, the Competition Bureau recognized that it needed an influx of resources to deal with the burgeoning wave of new mergers resulting in large part from globalization and free trade. Revenue from fees for services was seen as an appropriate source to fund these necessary activities. Thus, in November 1997, after extensive consultation, the Bureau introduced fees for a number of its services and regulatory processes, namely pre-merger notification, advance ruling certificates, advisory opinions and photocopies. The Bureau also developed service standards in consultation with stakeholders to ensure that, since they were now paying for services, clients would have some say in the manner and timing of the delivery of those services.

One of the expectations of both Treasury Board and those paying the fees was that revenue would be used to improve the current merger review process. A benchmarking exercise was seen as an ideal way to meet that obligation and was timely, given the rapidly changing environment within which the Bureau and the Mergers Branch then operated. A rising number of filings, an increase in complex multi-jurisdictional mergers, and the challenges of changing technology were all having a significant impact on the work of the Mergers Branch.

The Benchmarking Project

The project was led by the Compliance and Coordination Directorate of the Bureau with a Steering Committee and Working Group composed of managers and staff from the Mergers Branch and the Competition Law Division , Industry Canada Legal Services, Department of Justice ("Competition Law Division, Justice Canada").

The objectives of the study were to develop processes and procedures that are realistic and that reflect the best practices of the Bureau's benchmarking partners, are useful from an operational perspective, are client-responsive and are as efficient and consistent as possible. The expected benefits were increased efficiency, improved client service and turnaround times, improved training and career development and better overall functioning of the Branch.

It was important to involve in the project all persons with an interest in the success of the Canadian merger review process, including Mergers Branch employees, staff who provide ancillary services to the Branch, and lawyers representing merging parties. In addition, other competition agencies were invited to participate in order to give the Bureau an opportunity to understand and compare their approaches and ultimately incorporate their best practices when appropriate. These agencies, it was discovered, faced many of the same challenges in merger review as did the Competition Bureau.

The Study

The Benchmarking Project represents the most thorough study ever undertaken by the Bureau of its operations. It is the first comprehensive examination of the merger review process in Canada since the enactment of the *Competition Act* in 1986.

The authors of the Benchmarking Study ("the authors")[1] undertook process mapping which broke down the steps of the merger review process into its individual components and enabled the Working Group to identify strengths, bottlenecks, areas for study and potential solutions.

Interviews with Mergers Branch staff provided an exceptional opportunity to benefit from the day-to-day experience of those faced with the unprecedented number of mergers in recent years, globalization and the review of increasingly complex transactions.

In-depth interviews with a large number of lawyers who deal with the Branch on a regular basis enabled the Working Group to identify key issues, perceived and actual over the period of time since the introduction of the legislation in 1986. The lawyers had obviously spent a substantial amount of time preparing for these interviews, and were ready not only to identify issues but also to offer constructive suggestions for change.

Interviews with other competition agencies enabled the comparison of practices in Canada with those in other jurisdictions and allowed the Bureau to benefit from their processes, their experience and the thinking that has gone on in agencies faced with similar challenges. Members of the Working Group also interviewed lawyers in these countries to obtain their views on their country's system, and their insight into what they consider to be best practices related to merger review.

Attributes of an Effective Merger Review Process

All competition agencies are faced with a continuous increase in the numbers of mergers they are required to review, more and more of which are complex and involve multiple jurisdictions. This places greater demands on effective analysis (market definition, barriers to entry, rate and nature of change) and requires ongoing dialogue with the parties. It also increases the necessity for effective cooperation with other investigative agencies around the world.

The Mergers Branch is recognized by those interviewed for the professionalism of its staff, and their dedication and commitment to respecting and working within closing dates. Having said this, it should be understood that a great deal of the frustration expressed by members of the bar about the current review process was focussed on problems and issues that were seen to have developed since the inception of service standards.

The study's findings are consistent with respect to the essential attributes of an effective merger review process, whether identified by Mergers Branch staff, members of the bar, other competition agencies or the authors of the International Competition Policy Advisory Committee report.

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[1] The authors of the Benchmarking Study are Lise Davey, Manager, Client Services and John K. Barker, Assistant Deputy Commissioner, Compliance and Coordination Division, Compliance and Operations Branch, Competition Bureau.

Consistently, the first and foremost factor identified is that every successful merger review process is built on the ability of an agency's staff to review and assess filings effectively and quickly at the front end of the process. The agency must "cast its net" widely enough to capture potentially problematic transactions. Having said that, the agency must also have a system in place that allows it to quickly identify cases with competition issues and quickly close those that do not raise concerns. This report includes recommendations related to both the structure and process for achieving this crucial requirement.

Another attribute of a "best practice" agency is consistency of approach among case officers during the merger review process. This includes consistency in the nature and scope of information requests, and in the guidance provided to lawyers.

Other key attributes of an effective merger review system identified by the study are openness/transparency and accessibility. It is important to have a dialogue with the agency early in the process to quickly narrow the issues. Several agencies have formal or informal processes to allow discussions prior to filing, which have the advantage of allowing early identification of issues and related information requirements and, by corollary, of issues that are "off" the table. It is important, once the filing is made, for counsel to have an ongoing dialogue with the agency to discuss new issues and get a sense of the status of the review.

Linked to openness is the requirement that agencies publish as much information as possible in guidelines, notices, annual reports, statements and speeches. Articulating clearly an agency's rationale for challenging, or refraining from challenging, significant transactions (that is, decisions that set precedents or otherwise indicate a shift in doctrine or policy) adds fundamentally to the understanding of the agency's underlying approach. Publishing comprehensive guidelines on merger review, as has been done in Canada, enhances understanding and provides discipline for both the agency and filing parties.

Successful merger review is also based on well-thought-out and implemented training and development programs. Such programs provide staff with a full understanding of the economic and legal issues related to merger review and the context within which mergers or specific transactions are taking place. Training programs are critical to the quality of merger review, given the complexity and breadth of the issues involved and continually emerging trends. One obvious benefit of a training program is that it enhances consistency within the review agency and increases confidence among staff when providing advice to lawyers and making decisions.

Maximizing the use of technology is necessary today to support timely and effective merger review. Technology can be used to develop databases to ensure the consistency of information and the ready availability of information on precedents. Technology can also help speed the movement of files and reports within the review agency, reducing the time needed to assign or review matters.

Summary

The report identifies those areas of the current merger review process that are effective and efficient and those where change may be required in order for the Mergers Branch and the

Bureau to create a "best practice" process from start to finish. This will assist the Branch in discharging its responsibilities in a timely, thorough, transparent and consistent fashion, according to the requirements of the law. A comprehensive set of summary observations is included at the end of this report.

Many suggestions, if adopted, will represent a substantial change for the Branch and the Bureau. Some will affect not only the structure of the Branch but also its processes, approach to delegation and decision making. It is the view of the authors that this process improvement initiative will also ensure Canada has an effective, efficient, open and responsive system for linking the best practices at home with the best learning and practices from abroad.

For this benchmarking initiative to have the greatest impact, it must be recognized that the project is only a start, and that continuous learning and review are essential to maintaining the best practices described above.

A reasoned approach is being taken while implementing some of these changes. Some have been adopted, and others need to be refined and adapted to ensure a smooth transition. Moreover, sufficient effort should continue to be given to communicating the findings of this report (and related decisions by managers) to Branch and Bureau staff to avert any potential anxiety or stress that may arise from such change.

The project benefited from the support, guidance, time and energy of all of those in the Bureau, the Department of Justice, the private sector and other competition agencies who contributed in so many ways to the creation of this report.

Background

Chapter 1

On November 3, 1997, the Competition Bureau introduced fees under the *Competition Act* for the following services and regulatory processes:

- pre-merger notification filings;
- advance ruling certificate requests;
- advisory opinion requests; and
- photocopies.

Prior to implementing the fees, the Bureau had experienced mounting pressure to commit greater resources to merger review. In its report to then Director of Investigation and Research (now the Commissioner of Competition), the Consultative Panel on Amendments to the Act noted that "the Competition Bureau cannot address all meritorious cases.... Cost recovery measures should be explored as an alternative means of addressing resource constraints, particularly if it could be assured that the Bureau would directly benefit from the imposition of any such fees.[2]"

Treasury Board and stakeholders both recognized that an influx of resources would enable the Bureau to effectively deal with cases and adopt a systematic approach to reviewing and improving internal processes.

When the Bureau consulted stakeholders about introducing fees in 1997, it was essentially in a financial crisis and had been forced over the previous few years to delay, and in certain cases abandon altogether, other important enforcement activity in order to fund merger review.[3] In 1996–97, the situation was critical, and stakeholders, particularly the Competition Law Section of the Canadian Bar Association, encouraged the Bureau, Industry Canada and Treasury Board to introduce fees to increase Bureau resources and ensure the continued effectiveness and timeliness of merger review.

In November 1997, the Minister of Industry approved fees for services and regulatory processes, as shown in Table 1. These fees were accompanied by service standards, which the Bureau developed in consultation with stakeholders. The Bureau also received Treasury Board's approval to retain the revenue generated from these fees. There were expectations that these revenues would be used to improve the services for which they were earned.

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[2] Report of the Consultative Panel on Amendments to the Competition Act, March 6, 1996.

[3] Because merger review is a legislated requirement with imposed deadlines and the Bureau has no control over the level or complexity of merger activity in any given year, the Bureau has often in the past had to defer resources from other areas, such as conspiracy and abuse of dominance investigations and regulatory interventions, to deal with the merger caseload.

Table 1. Fees and Service Standards under the *Competition Act*

Service or Regulatory Process	Maximum Turnaround Times	Fees
Merger review (notifiable transactions and advance ruling certificates)		
Non-complex	14 days	$25,000
Complex	10 weeks	$25,000
Very complex	5 months	$25,000
Advisory opinions		
Non-complex	4 weeks	$4,000
Complex	8 weeks	$4,000

In May 1997, the Deputy Minister of Industry asked four organizations at Industry Canada involved in client service initiatives — the Corporations Directorate, the Office of the Superintendent of Bankruptcy, the Canadian Intellectual Property Office and the Competition Bureau — to undertake benchmarking[4] exercises. The mandate was to compare critical service areas against some of the best of similar agencies worldwide, with a view to incorporating best practices and ultimately improving government services.

At the same time, government agencies were focussing on Quality Service Initiatives, placing renewed emphasis on fee-related services and recognizing the inherent obligation of governments to be accountable to those paying fees for services. There was increased media and stakeholder attention to user fees, and expectations were that, when fees were imposed, clients would have a say in the manner and timing of service or product delivery.

The Bureau selected the merger review process for benchmarking as it is the largest fee generator and a critical area from a stakeholder perspective. In addition, the Bureau's performance on a number of international merger cases had been criticized, and the merger review process faulted for delaying important multi-jurisdiction transactions.

In 1998, the Bureau gathered a team of representatives from the Mergers Branch, the Compliance and Coordination Directorate and the Department of Justice ("Competition Law Division, Justice Canada") to begin the benchmarking initiative. Those involved saw it as an opportunity to carefully examine the Bureau's merger review process, to identify critical areas, to compare it with the process in other jurisdictions and, ultimately, to improve timeliness, quality of analysis, transparency and predictability. The Compliance and Coordination Directorate of the

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[4] In this report, *benchmarking* is defined as the process of continuously comparing and measuring our organization against others anywhere in the world to gain information on philosophies, policies, practices and measures that will help us improve performance. From *Applying Benchmarking Skills in Your Organization, A Course Presented by the American Productivity & Quality Centre*.

Compliance and Operations Branch took the lead in managing the benchmarking initiative. As the Directorate had developed the policy on fees and service standards, it was thought to be an objective party to assess merger review and make recommendations.

Lise Davey, Manager, Client Services, reporting to John Barker, Assistant Deputy Commissioner, Compliance and Coordination, was identified as project manager. Both played leadership roles in the development of the policy on fees and service standards and prepared the submission to Treasury Board for revenue retention.

A Working Group and Steering Committee were formed. Membership over a two-year period included the following:

Working Group
Lise Davey
Kelly-Ann Smith
Jeanne Faubert
Andrew Kavchak
Dave Ouellet
Rollande Joanis
Andrée Laflamme
Howard Baker (Department of Justice)
Cynthia Richardson
Jocelyne Chapleau
Lynne Charpentier
Richard Elliott

Steering Committee
Francine Matte
Jim Bocking
Ray Pierce
John Barker
Lise Davey
Cynthia Richardson/Daniel Campagna
Gaston Jorré
Bob Lancop
Ann Wallwork
Robert A. Morin
Huguette Boulerice

During the first year of the benchmarking initiative, much of the Bureau's activity focussed on implementing and refining the administration of the fees and service standards policy, areas that were completely new to the Bureau. Credit and chequing accounts were established and formal revenue procedures were developed to meet Treasury Board and *Financial Administration Act* requirements. For example, the Management Policy and Services Directorate guaranteed to process receipts immediately from 8:00 a.m. to 5:00 p.m. This is essential as law firms often send agents to hand-deliver pre-merger notification filings, and ask that they wait for receipts.

Likewise, the Competition Law Division, Justice Canada committed to providing the Prenotification Unit with direct and priority access to lawyers so that legal issues related to filing could be dealt with as quickly as possible. Because parties were now paying $25,000 for merger review, many sought clarification as to what was legally required to be notifiable, and under what circumstances, if any, an advisory opinion could be requested (for $4,000) instead of an advanced ruling certificate (for $25,000).

Once most initial issues were resolved, the Bureau published a "frequently asked questions" document[5] and a second version of the *Fee and Service Standards Handbook*.[6]

In February 1999, the Bureau hosted a forum with stakeholders to solicit feedback on the first year of the fee and service standards regime. Stakeholders did not question the fees, but were concerned that service standards had resulted in additional bureaucracy, which was affecting service. The Bureau published a report[7] following this meeting, and placed renewed emphasis on completing the benchmarking process in order to address stakeholder concerns.

During the 1999–2000 fiscal year, it became evident that the intensive examination of the merger review process represented by the benchmarking project was timely and, indeed, critical for the following reasons:

- the merger caseload had doubled from 1994–95 to 1998–99;
- merger transactions had increased in complexity due mainly to deregulation and the globalization of markets;
- amendments to the *Competition Act* came into effect in 1999;
- new regulations under Part IX of the Act came into effect on December 27, 1999; and
- proposed bank mergers, the largest ever examined in Canadian history, required unprecedented resources.

Methodology

The initiative followed the benchmarking methodology set out by the American Productivity & Quality Centre (APQC), which also trained members of the Working Group on benchmarking. Note, however, that the description of the process below is simplified and that many of the steps include sub-steps and other components.

The APQC methodology involves the following key steps:

- establish a team, pick a champion and earmark resources;
- map the process to be benchmarked;
- identify stakeholders;
- identify the critical success factors;[8]
- identify the core business processes that have the greatest impact on those success factors;

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[5] Competition Bureau. *Fee and Service Standards Policy Pursuant to the Competition Act, Frequently Asked Questions*. Ottawa: June 15, 1998.

[6] Competition Bureau. *Fee and Service Standards Handbook Pursuant to the Competition Act*. Ottawa: May 1, 1998, release 2.

[7] Competition Bureau. *Fees and Service Standards: Report on Forum held February 2, 1999*. Ottawa: May 1999.

[8] Characteristics, conditions or variables that have a direct influence on a customer's satisfaction with a specific business process — the few areas in which satisfactory performance is essential for a business to succeed.

- identify benchmarking partners;
- do secondary data collection (prepare for surveys and interviews with partners);
- survey and interview benchmarking partners;
- analyze and normalize data; and
- recommend and implement.

Process Mapping

When undertaking a benchmarking study, it is critical to understand the process that one is attempting to improve. Process mapping enables the identification of the critical functions within a process, who the critical stakeholders are, what the critical success factors are from stakeholders' perspective, and the potential bottlenecks that could impede the efficiency and effectiveness of the process.

Critical staff are interviewed as part of process mapping. For example, those involved with pre-merger notification were interviewed, the processes were documented and the bottlenecks identified. Interviewees later verified the accuracy of the findings, which, in turn, were presented to the working group for discussion.

Stakeholder Interviews

A key component of benchmarking is the identification of key stakeholders and their business requirements and concerns. It is important to identify types of stakeholders, both internal and external, and to carefully balance their needs without compromising independence, timeliness, sound economic theory and other key attributes.

Merger Branch staff and those involved in merger review, including staff in the Competition Law Division, ("Competition Law Division, Justice Canada"), the Management Policy and Services Directorate, and the Commissioner's Office, were identified as internal stakeholders.

A survey was developed to obtain the views of Merger Branch staff, since as key stakeholders, they have an intimate view of the entire merger review process and a collective wealth of experience and knowledge. Staff surveyed included managers, individuals who have been with the Branch since its inception, others with many years in merger review and those who are new.

It is important to note that this survey was meant to obtain views and identify issues. It was not intended to represent a factual representation of information. About 40 staff received the questionnaire at a Branch meeting and could fill it out anonymously if they wished. More than 20 people returned completed questionnaires.

A key element in undertaking external stakeholder interviews was to focus on lawyers who deal with the Mergers Branch regularly. It was also important to identify those who had dealt with the Bureau for many years, and to ensure input from those in contact with the Bureau both before and after the fees and service standards were implemented.

More than 40 lawyers were interviewed. They were given the initial questions well before the interviews and came well prepared, offering candid opinions and suggesting improvements to the merger review process.

Benchmarking Partners

Following process mapping, stakeholder interviews and the identification of critical success factors, competition organizations in other similar jurisdictions were invited to become benchmarking partners. The organizations selected were those with similar practices and at similar stages of development as those in Canada. The organizations that signed on as benchmarking partners include the Office of Fair Trading in the United Kingdom, the Federal Trade Commission and Department Of Justice in the United States, and the Australian Competition and Consumer Commission.

Heads of these organizations received an invitation from Canada's Commissioner of Competition to provide input to the merger review benchmarking initiative. In return, the Competition Bureau would provide the organizations with the findings of this study and ensure confidentiality of any sensitive information.

Important steps in this data collection phase were identifying the frameworks for merger review in these jurisdictions, identifying processes and issues related to merger review, and interviewing agency personnel and a number of their client lawyers in person to learn from their experience.

Feedback Mechanisms

With the implementation of the Fee and Service Standards Policy, the Bureau also committed to providing stakeholders with feedback mechanisms. These were intended to give those paying for services a say in their delivery and a recourse for lodging complaints. Three vehicles were introduced: the Fee and Service Standards Forum, a redress mechanism and feedback leaflets. Information from these sources was reviewed for the purpose of this benchmarking initiative.

The Fee and Service Standards Forum involves periodic meetings with major stakeholders to review fee-related processes. For information about the Bureau's first forum following the implementation of fees and service standards, which was held in February 1999, refer to the *Competition Bureau Fees and Service Standards Report on Forum*. (http://competition.ic.gc.ca)

The Deputy Commissioner, Compliance and Operations is the first person to review complaints lodged using the Bureau's redress mechanism, although no one has used this process as of the date of publication. For more information, see the *Fee and Service Standards Handbook*. (http://competition.ic.gc.ca)

The Bureau developed feedback leaflets and sends these with all responses to fee-related processes. For example, when parties receive their advanced ruling certificate, they also receive a postage-paid feedback leaflet. A summary of these cards is included in Chapter 8 - Report on Feedback for Merger-Related Services.

Other Resources

Many documents and reports were reviewed during the course of this study. These include publications of the UK Office of Fair Trading (OFT), U.S. Department of Justice (DOJ) and Federal Trade Commission (FTC), Australian Competition and Consumer Commission (ACCC) and the International Competition Policy Advisory Committee (ICPAC).

Merger Review in Canada

Chapter 2

This chapter describes the merger review process as documented by the process mapping undertaken in 1998–99 and updated in the spring of 2000. The first section outlines the steps involved in reviewing proposed merger transactions (pre-merger notification and advance ruling certificate requests) and identifies the other branches or sectors involved in the process.[9]

The chapter is laid out in the following manner:

- prenotification;
- case assignment and review;
- legal advice;
- financial processing;
- international cooperation;
- photocopy unit;
- resource centre; and
- summary of one-on-one interviews.

Merger Pre-notification

Notification, one of the most critical components of the process, is described as fundamental by both Mergers Branch staff and external stakeholders for the following reasons:

- delays in the Notification Unit have a direct effect on the time Branch staff have to do an initial assessment, determine the complexity of the file and meet closing dates; and
- delays in the Notification Unit affect overall turnaround times stakeholders can expect and affect timing of a lawyer's ability to speak with a case officer to discuss filing requirements and concerns about the proposed merger.

In 1998, when the merger review process was initially mapped, service standards were new. In addition, there was a substantial increase in legal interpretations related to Part IX of the *Competition Act*[10]. Filings had also doubled in the previous two years, which substantially increased the level of traffic in the Pre-merger Notification Unit (PNU).

From the point of view of the Mergers Branch, the PNU was seen, at that time, as a bottleneck. In some instances, it took two or three days for a file to be assigned to a particular division. This was further compounded by the physical layout of the Unit: a PNU officer with a support person located a considerable distance away. The Unit shared with the rest of the Branch the one fax machine parties used for filings. While layout and equipment might appear to be fairly insignificant, they were having a considerable effect on turnaround times in the Unit.

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[9] It does not describe the process for transactions from Investment Canada or other examinations/administrative work undertaken by the Mergers Branch.

[10] Because parties were now required to pay a fee, they wanted the assurance that their transactions were, in fact, notifiable.

During the course of this project, it was concluded by Branch management and the project team that the PNU required additional staff in view of the increasing complexity of cases, the growing number of requests from stakeholders for information and assistance and the new regulations and guidelines.

The Mergers Branch has addressed this issue by creating the Merger Notification Unit (MNU). The MNU does an initial triage of all incoming files, indicates the complexity, forwards complex and very complex files to Division A or B and handles the majority of the non-complex files. New and experienced officers are assigned to the MNU to handle the workload and reduce the number of non-complex files assigned to the divisions. This enables the divisions to focus on the more complex files. This arrangement also provides excellent training and coaching opportunities for new officers assigned to the MNU.

Each step in the MNU process is described briefly below based on the June 2000 update of the original mapping. Because of the many improvements the Unit has made since 1998, the MNU and its processes are considered by the authors to be "best practices".

1. The receptionist on the 21st floor of the Competition Bureau's offices receives the great majority of merger-related service requests. Counsel for the parties usually send the documents by courier, but on rare occasions they deliver them by hand. The receptionist dates and time stamps the envelope and e-mails the MNU secretary and MNU officer to request pick-up, which usually happens immediately.

2. The secretary initials and time stamps the covering letter, and then opens a file in the tracker system and attaches one of several colour-coded "process slips" to the documentation.

3. The secretary prepares the receipt letter[11] for the MNU officer's signature and provides the package to the officer for review.

4. The secretary obtains a financial receipt from Management Policy and Services for the $25,000 fee, which parties usually pay by cheque.

5. The MNU officer, after completing a review, fills out the process slip, indicating the legislated review period and whether the file is complete, and then sends it back to the secretary for processing. The MNU recently instituted a process whereby a file may be assigned to a division for review even when it is not complete. The officer keeps a record of these files and follows up with the responsible officer regularly to ensure ultimate completion of the filing.

6. The secretary sends the receipt letter, indicating the time and date the Bureau received the documentation and payment (when applicable). A letter indicating whether or not the file is complete is also provided. This correspondence is faxed to the parties and sent by mail.

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[11] Stakeholders see this as very important; it confirms that the Bureau did, indeed, receive the documentation and when.

The above steps are always completed on the same day the Bureau receives a pre-merger notification or advance ruling certificate request unless the material arrives later in the day or there are issues with the filing, in which case the file is processed the following day.

7. The secretary inputs relevant information into the tracker and maintains a financial log to track cheques, receipts and outstanding payments. Each month, the secretary reconciles the log with the financial report provided by Management Policy and Services. This ensures accuracy in the Bureau's financial system and that all payments are tracked and accounted for.

8. The secretary maintains a separate log of incomplete filings[12] and checks daily with the MNU officer to find out whether additional information has been provided and if the file is complete.

9. The secretary writes the end date of the waiting period of the transaction on a calendar. Parties are requested to notify the MNU once a transaction is completed. The secretary receives this information and enters it into the tracker. The secretary has a procedures manual that is maintained and updated so that others are able to step in and perform these duties in the secretary's absence.

10. The MNU officer deals regularly with calls about filing requirements. Because of the incumbent's experience in the MNU, most questions can quickly be answered. In addition, over a number of years, the MNU has amassed a volume of interpretations and legal advice that has been provided to counsel.

11. When a question related to Part IX of the *Competition Act* arises that the MNU officer cannot answer, the practice is to telephone or e-mail the dedicated Department of Justice counsel for the MNU (see "Legal Advice" in this chapter for more information).

Observations

1. Interpretations and advice provided to counsel is currently housed in various formats: binders and emails. To ensure consistent information to stakeholders, it is recommended that the Branch enter this information into an electronic database, indexed by section of the Act, regulation number and issue, so anyone in the Branch can have access to it. With amendments to the *Competition Act* and regulations, it is especially critical that consistent information is provided to lawyers.

2. Counsel should be reminded that all correspondence including pre-merger notification filings, requests for advance ruling certificates, competition briefs and additional information pertaining to a file should be directed to the MNU and not to the case officer.

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[12] The information that is usually missing from a filing includes the names and telephone numbers of clients and suppliers (20 for a short-form filing and 40 for a long-form filing) and justification of why s.116 is being used to substantiate not providing certain information.

Counsel should be advised that adhering to the process ensures appropriate follow-up and timeliness.

3. A vehicle for providing regular updates about procedures to the "frequent filers" has also recently been adopted. The MNU has committed to meeting with stakeholders on a regular basis.

4. Counsel should be encouraged to provide several "certified true" copies of their documents. This would enable the Mergers Branch to maintain originals while providing officers with working copies, and would bring the Canadian process more in line with the practices followed by counsel and agencies in other jurisdictions.

Case Assignment

The authors have concluded, based on their research, that the practices described below represent "best practices."

1. When the secretary of the MNU receives a file, an e-mail is sent to the Assistant Deputy Commissioner with a copy to his/her secretary, to the program officer[13] and to the MNU officer with enough information about the file to determine to whom it should be assigned. The Assistant Deputy Commissioner responds, usually within an hour or two, with the name of the officer and his or her supervisor. The MNU secretary enters the name of the officer into the tracker and takes the file directly to the officer. This is a new process, one that has replaced earlier manual processes and reduced processing time by up to two days.

2. Once a Division secretary receives a file, it is registered in a database with relevant information, including whether the file is complete and the service standard period if it is known at the time. The secretary also enters a BF (bring forward) date for five days later, at which time a verification is made with the officer to determine whether the service standard period has been established. Once established, the appropriate service standard letter is prepared for the Assistant Deputy Commissioner's signature. One exception to this process is when the assessment will be completed within five days. Under these circumstances, officers usually telephone the parties' lawyers to let them know of the outcome.

3. When the review is complete, the officer completes his or her assessment in either a "template" or WordPerfect format.

4. Based on the assessment, the Division secretaries produce the appropriate response for the Assistant Deputy Commissioners' signature. The secretaries prepare all letters and certificates. Templates have been developed for all possible responses. The secretaries send the response by fax and mail. Feedback leaflets are included with all responses.

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[13] Program officers are also the designated back-ups for the secretaries for urgent matters.

5. Once the review is completed, the secretaries modify the tracker to indicate the actual end date of the review. They also indicate whether the review resulted in an advance ruling certificate, a no-action letter or other action. All letters, certificates and important correspondence are maintained on the Mergers Branch tracker for future reference.

Legal Advice

The process for obtaining legal advice for the MNU is seen as a best practice.

The Competition Law Division, Justice Canada has a dedicated lawyer to provide legal advice on notification issues. The MNU and this lawyer usually exchange e-mails and telephone calls and confirm any formal advice in writing, usually by e-mail. If this lawyer will be absent, he notifies the MNU and ensures someone else will be there to provide backup legal support.

Numerous formal and informal opinions have been provided by counsel to the MNU over the past several years. It would be beneficial both for the Bureau and the Competition Law Division, Justice Canada to have all of these captured and indexed electronically.

Financial Processing

The processing of financial receipts and information is considered a best practice.

There is a dedicated financial officer who ensures that receipts are processed as quickly as possible. There is an additional person available to do this when the primary person is absent. Approximately 90 percent of the revenue processed in the Management Policy and Services Directorate is related to mergers.

The MNU and the financial officer have developed excellent communications, keeping each other abreast of upcoming absences and urgent requests.

Program Officers

There was a consensus amongst case officers that there has been a huge improvement in the handling of cases since program officers were added to case teams. They are seen as invaluable to the timely resolution of cases.

These program officers free case officers to focus on the analysis of the transaction. The program officers are responsible for coordinating major files and perform a number of valuable functions such as the following; they

1. register all correspondence in the tracker system;[14]
2. search the Internet and obtain documents and information from the Resource Centre;

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[14] A devoted database file is usually developed for big files.

3. coordinate all incoming documents from section 11 submissions (they code documents,[15] copy, register information in the tracker and return documents to the parties);
4. prepare contact lists and make telephone calls to obtain such things as annual reports;
5. assist in the preparation of affidavits;
6. assist in the preparation of binders for the Tribunal;
7. often arrange for electronic equipment such as laptops, servers, etc;
8. coordinate the Witness Tribunal Appearance schedule;
9. often coordinate flight and accommodation schedules for witnesses, experts, officers and support staff;
10. prepare travel claims once travel is complete;
11. close files and create indexes in the event that documents are ever required in future cases; and
12. often complete standard replies to correspondence.

The program officers expressed the desire to become more involved in assisting officers on cases. Unfortunately, because there is only, at present, one Program officer for each division, they are barely able to provide full support on all of the big cases.

In view of this caseload, program officers felt they had not had the opportunity to demonstrate their full potential. Case officers also recognized that program officers have heavy workloads and therefore were reluctant to impose additional demands.

Given the success to date and the obvious potential for them to assume additional duties, it is the view of the authors that the Branch would benefit from hiring more program officers.

International Notifications and Contacts

The International Affairs Division of the Economics and International Affairs Branch ("EIA") receives notifications from other jurisdictions (mainly from Australia, the European Union and the United States) and notifies other agencies of any notifiable Canadian proposed transactions with international aspects. All notifications received from foreign counterparts are immediately forwarded to the MNU for processing.

Timely and systematic communications between EIA and foreign counterparts are also very important when identifying relevant foreign contacts. This is especially true with regards to the European Union and its tight timeframe for reviewing mergers. There is a limited amount of time in which Mergers Branch can review a common merger and discuss potential remedies that are acceptable to Canada.

The newly introduced inter-Bureau International Committee continues to contribute to improvements in this area.

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[15] In the dairy file, one officer coded and certified about 50,000 documents.

Photocopy Unit

The Photocopy Unit in the Management Policy and Services Directorate photocopies all documents for proceeding before the Competition Tribunal and all section 11 documents, among others. The Unit provides very fast turnaround times, provided staff receive advance notice when the task involves numerous documents. Frequently, however, the Unit is advised at the last minute of urgent and voluminous requirements. A better approach to planning requests will result in a more efficient process.

Resource Centre

The Resource Centre has two dedicated officers who conduct searches for information for the Bureau. These staff are regularly called upon to provide company information, industry information and legal documents. In 1998, with the advent of fees and service standards, the Bureau instituted a procedure to ensure that Resource Centre staff understand the urgency of requests and the type of information usually required by the Mergers Branch. The quality and timeliness of the responses of the Resource Centre is seen as a "best practice".

Summary of One-on-One Interviews

During the course of the mapping process, many individuals across the Bureau were interviewed in order to enable the authors to describe the merger review process in Canada. Employees were also asked open-ended questions like: "How would you improve the merger review process?" The following section is a summary of those comments that were made by employees. They reflect only those comments that were made by several employees in order to respect confidentiality.

These interviews clearly indicated that merger employees find their work extremely interesting, challenging and exciting. They deal with novel issues, work under tight deadlines and in most instances are quite satisfied with their careers in the Branch. Having said that, at the time of these interviews, comments also demonstrated that both divisions in the Mergers Branch were facing extreme workload pressures and did not, according to most, have enough staff.

The following are the main themes that surfaced during these interviews.

Service Standards

Some of those interviewed felt that the merger process had become more process-oriented since fees were introduced. In this regard, it was noted that some lawyers were providing submissions on the complexity of a file. This was seen as being of limited value to the Bureau, the lawyers and the parties. Some also expressed the view that because service standards were not introduced as a result of external demand, they add little to the process. It was the general view that closing dates rather than the service standard should be the driver of Branch activities.

There was indication that staff would support a review of the current service standards policy.

Workload

The consensus amongst those interviewed was that "no-issue" cases were dealt with quickly, and the big cases were well staffed and given the necessary priority by managers. The cases that fell in the low to moderately complex categories seemed to be more problematic. Case officers saw these as requiring significant time and effort. With the current caseload (at the time of the interviews), officers felt that these cases were under-resourced.

It was noted that certain officers generally work only on big cases. This has had a number effects:

- some valued the opportunity to focus on a single case and not be distracted by other files;
- some case officers admitted to being overworked and close to exhaustion.

A number of staff expressed the opinion that workload would be less of an issue if there were an easier flow of officers into the Branch from other parts of the Bureau when the Branch is faced with a big case.

Officers also suggested that the Bureau should actively explore the potential for interchange or other programs to provide for hiring lawyers from private practice. This would further ensure a good mix of experience and new staff.

Training

There was a clear consensus that there was a need for a Merger Branch training program. This would be aimed at

a) new staff who would be given a structured introduction to the Branch and Bureau;
b) all staff who would receive training on new and emerging issues, and gain expertise in specific sectors.

Some senior members of the Mergers Branch were frustrated because of their heavy workload and the resulting inability to provide adequate training and coaching to new staff. By the same token, new officers felt like they must "sink or swim" because they received limited training, coaching or guidance.

This led to some new officers' lacking confidence when speaking with experienced lawyers and senior company officials, particularly when they were discussing complex issues such as market definition and barriers to entry.

The interviews also revealed that, as a result of a lack of training and confidence, some inexperienced officers were concerned that they might be classifying transactions in a higher category to provide more time to learn about an industry and geographic markets.

Table 1. Number/Percentage of Cases by Level of Complexity Excluding Securitizations*
This table includes all the transactions that have been completed by the end of the fiscal year (may include transactions that did not commence the same year)

	Number of Transactions							
	2000-2001		1999-2000		1998-1999		1997-1998[16]	
Complexity	#	(%)	#	(%)	#	(%)	#	(%)
Non-complex	282	(81)	232	(80)	212	(77)	68	(89)
Complex	53	(15)	49	(17)	56	(20)	8	(11)
Very-complex	14	(4)	8	(3)	6	(2)	0	n/a
Total	349	(100)	289	(100)	274	(100)	76	(100)

*Includes all completed transactions from April 1 to March 31 except 97/98, see footnote 16.

Table 1 indicates that overall, the merger cases reviewed by the Branch continue to enjoy fairly consistent distribution in terms of complexity levels. In 1997, then the Bureau was about to introduce service standards, there were expectations that, based on caseloads from 1993 to 1996, about 85 percent of files would fall into the non-complex category, 10 percent in the complex category and 5 percent in the very complex category. The last two fiscal periods indicate a distribution closer to 80 percent non-complex, 15 percent complex and 5 percent very complex.

The issues of training and consistency in classifying complexity are being addressed. With the latest hiring of new officers, the Mergers Branch has instituted a formal training process that includes an overview of the work of the Bureau, merger review and notification training. The Branch also provides regular coaching, mentoring and the opportunity to rotate to other parts of the Branch. Several senior officers have also been provided with training through the Department's Leadership Development Initiative (LDI). In addition, the MNU classifies all files (complexity levels)to ensure consistency and predictability in this area. These initiatives are expected to improve morale, workload issues and the quality and timeliness of merger review.

Other Issues

According to some of the case officers, even though the filing form was recently amended, it still does not provide all of the information required to assess competition issues. Some felt that moving closer to the U.S. model, with its greater information requirements and 30-day initial review period, would be beneficial for parties, particularly those involved in multi-jurisdictional transactions.

Branch staff clearly stated the importance of experienced Department of Justice lawyers to support Mergers Branch activities.

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[16] Represents only those files completed between November 3, 1997 and March 31, 1998.

Most case officers agreed that the delegation of approvals to the Senior Deputy Commissioner and the Assistant Deputy Commissioners had helped improve internal turnaround times. Some cautioned, however, that in view of the three-year period in which the Bureau may challenge a completed transaction and the relative importance of "no-action" letters on non-routine cases, the latter should be reviewed by experienced Department of Justice lawyers before being sent to parties.

Some also noted that consideration should be given to amending section 11 and section 18 of the *Competition Act* to remove the requirement to return documents within 60 days. Parties could be required to provide the Branch with three "certified true copies," which would not be returned. This would improve turnaround times for the Bureau and reduce the costs of overtime for officers and employees working in the Photocopy Unit.

The Mergers Branch Employee Survey

Chapter 3

This chapter complements the information in Chapter 2 on the Canadian Merger Review Process. The purpose of the employee survey was to give all Mergers Branch employees the opportunity to provide input into the benchmarking process. It was intended to provide a way for employees to openly and confidentially share their views and perspectives on the Branch.

Branch and non-Branch employees developed and reviewed a brief questionnaire (Annex A) to ensure that terminology would not be a problem for anyone answering the questions and that the questionnaire was clear and concise. In light of the responses received, the authors believe that parts of the questionnaire could have been better expressed to avoid some apparent ambiguity. This appears to have had only a minor impact on the results, however.

Employees received the survey at a Branch meeting in March 2000. The Deputy Commissioner and one of the Assistant Deputy Commissioners were present and provided a brief overview of the purpose and importance of the survey. Most employees were already familiar with the benchmarking initiative, although others were hearing about it for the first time.

All employees were encouraged to complete and return the questionnaire. They could complete it anonymously or include their name and telephone number so they could be reached if clarification about a particular comment was needed. About one third of respondents included their name and number. The survey was distributed to all 44 employees of the Branch and 23 (52.3 percent) completed questionnaires were returned.

The survey consisted of five questions, which were designed to gauge employee perceptions not generate fact-based responses. Employees were invited to expand on their views based on their experience. To encourage broad participation, the questionnaire was kept very brief; there were two pages of multiple-choice questions and additional space to elaborate if required.

The results are presented in the same order as the order of the questions in the questionnaire. Explanations related to each question are also given.

Results

Question 1: How many years/months have you worked for the Mergers Branch?

Among the 23 employees who responded, the average time in the Branch was 6.3 years, with the shortest time being 6 months and the longest 13 years.

Question 2: In your opinion, how could the merger review process be improved? Rank your responses 1 to 5 where 1 is most important and 5 is least important.

This question contained a list of 13 hypothetical improvements, 12 of which were to be ranked individually according to their importance on a sliding scale of 1 to 5. Some employees only chose five from the list and ranked them from 1 to 5. Other employees ranked all of the items, while others ranked more than five, but not all 12. The last item in the list was "Other (please explain)" and was intended to allow employees to write in additional details or other suggested improvements not included in the list.

Table 1 shows the items in the order they were presented in the questionnaire, and also the number of responses to each. The right-hand column indicates the ranking of importance most often given for each item. For example, a *1* appears in the right hand column beside the first item, "Delegate signing authority for non-complex opinions," because most respondents ranked this as most important.

Table 1

	Number of responses	Majority ranking
1. Delegate signing authority for non-complex opinions	17	1
2. Improve turnaround through the Prenotification Unit	16	4
3. Improve turnaround through Assistant Deputy Commissioner and/or Deputy Commissioner's offices	17	3
4. Simplify filing requirements	15	5
5. Review service standards	15	1
6. Review definitions of complexity	15	1
7. Delegate assignment of cases to someone other than the Assistant Deputy and Deputy Commissioners	17	5
8. Review and make more use of case weighting criteria	16	5
9. Hire more officers	21	1
10. Hire more support personnel	19	2
11. Provide more funding for experts	18	2
12. Improve tracker system	15	2
13. Other (please explain)	11	See below

The following list shows the suggested improvements in the order of importance respondents indicated. In other words, a majority of employees ranked all of the items under the heading Majority Ranking 1 as being the most important. Moreover, with each ranking level, each item has been listed in order of priority, based on the number of responses. For example, more employees ranked "Hire more officers" with a 1 than "Delegate signing authority for non-complex opinions."

Majority Ranking 1

Hire more officers
Delegate signing authority for non-complex opinions
Review definitions of complexity
Review service standards

Majority Ranking 2

Provide more funding for experts
Hire more support personnel

Majority Ranking 3

Improve turnaround through Assistant Deputy Commissioner and/or Deputy Commissioner's offices

Majority Ranking 4

Improve tracker system
Improve turnaround through the Prenotification Unit

Majority Ranking 5

Simplify filing requirements
Review and make more use of case weighting criteria
Delegate assignment of cases to someone other than Assistant Deputy and Deputy Commissioners

Other (please explain)

The "Other (please explain)" category generated many comments. These are summarized and grouped below.

Resource requirements: Many employees felt that the Branch should hire more officers and support personnel. Other requests included setting up another division, and better training and coaching for new employees. Others thought that additional experienced in-house economic assistance was required. One noted that "we need additional resources to review mergers as well as to contest them so that a body of jurisprudence can be developed."

Prenotification Unit: Several employees suggested expanding the Unit into a dedicated unit to handle the non-complex, non-overlapping and routine advance ruling certificate cases. Some noted that this unit should be headed by a CO-3 who could also classify cases (complexity levels).

Training: Some respondents noted that managers and senior officers should provide clearer guidance and instructions related to files, procedures, etc., and others noted that a detailed list of information required by industry should be developed.

Efficiency: Some noted that advance ruling certificates should go through the system more quickly and be signed by the Senior Deputy Commissioner[17]. Others felt that experienced CO-1s and CO-2s should handle the non-complex cases, that certificates should not take any longer than a day or two to process and that practices in both divisions should be harmonized.

Complexity definitions and service standards: There were comments that a new category should be created for files that fall somewhere between the current categories of non-complex and complex. Others felt that service standards should be reviewed and that the time when the waiting period clock starts should be clarified.

Question 3: In your opinion, what issues are of most concern to merging parties? Rank your responses from 1 to 5, where 1 is most important and 5 is least important.

This question contained a list of six items, five of which were to be ranked individually according to their importance on a scale of 1 to 5. For this question, employees ranked each of the items in order of importance as compared to the other items on the list. In other words, those who thought that "Turnaround times" was more important than "Quality of response" rated the first with a 1 and the second with a 2. The sixth item, "Other (please explain)" was intended to allow employees to write in additional details or other suggested improvements not included in the list.

Table 2 shows the items in the order they were presented in the questionnaire, and also the number of responses to each. The right-hand column indicates the ranking of importance most often given for each item. For example, a *1* appears in the right hand column beside the first item, "Turnaround times," because most respondents ranked this as most important.

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[17] Since the beginning of Benchmarking Review, the Commissioner has delegated this to the Senior Deputy Commissioner.

Table 2

	Number of responses	**Majority ranking**
Turnaround times	19	1
Quality of response	19	2
Lower fees	18	4
Filing requirements simplified, less burdensome	17	3
Reduce number of letters from Mergers Branch	17	5
Other (please explain)	9	See below

Other (please explain)

The "Other (please explain)" category generated several comments. These are summarized and grouped below.

Turnaround times: There were many comments related to the importance, to stakeholders, of turnaround times. Some respondents also noted that lawyers also want a "clear idea of where the concerns are."

Information requirements: Several respondents commented that stakeholders feel that "extensiveness of information requests is another concern."

Complexity definitions and service standards: Some respondents noted that complexity definitions are a cause of concern. "Turnaround time is the key point of interest for the bar".

Question 4: How could costs related to complex and very complex cases be reduced? Rank your responses 1 to 5, where 1 is most important and 5 is least.

This question contained a list of five items, four of which were to be ranked individually according to their importance on a scale of 1 to 5. For this question, employees ranked each of the items in order of importance as compared to the other items on the list. In other words, those who thought that "Use more internal economists" was more important than "Use Justice lawyers more often than outside counsel" rated the first with a 1 and the second with a 2. The "Other (please explain)" category was intended to allow employees to write in additional details or other suggested improvements not included in the list.

Table 3 shows the items in the order that they were presented on the questionnaire. It also shows the number of responses for each item and, in the right-hand column, the importance that was given most often. In other words, if most respondents thought the first item "Use more internal economists" was most important, then a 1 appears in the right-hand column.

Table 3

	Number of responses	Majority ranking
Use more internal economists	17	2
Use Justice lawyers more often than outside counsel	15	1
Make more use of weighting criteria and link to budgets	12	3
Monitor work products of contractors and conduct post-assessment of the work and costs involved	13	4
Other (please explain)	13	See below

Other (please explain)

The "Other (please explain)" category generated several comments. These are summarized and grouped below.

Case management: There were many comments related to increasing efficiency through improved management practices. For example, there was reference to the need to ensure a disciplined approach to developing a case to ensure that a change in direction does not occur in mid-stream. There was also reference to the need to quickly close cases where there is a low probability of success or where concerns really are not serious, as a way of focussing resources on key cases. Others noted that more information related to experts is required and that post-case assessments should be conducted in order "to prevent hiring experts who have not performed well and were unreasonably costly in earlier files" from being rehired. On the other hand, some expressed the view that "we do not spend enough, or do not have enough money to spend on complex and very complex cases" and that "the amount we spend on experts is a fraction of what's spent by the defence bar; cutting dollars here is a false economy."

Justice lawyers and experts: Respondents noted that the Branch should consider increased incentives to attract Justice lawyers. Some also felt there was a need for increased internal industry expertise.

Question 5: Any other comments and suggestions?

The following are examples of other issues respondents felt are important to an effective process.

- Complexity letters should be signed by CO-3s, and delegation of authority for non-complex cases and advance ruling certificates is a priority to streamline the process.
- Teams of officers, economists and outside counsel should be created at the earliest stage of a large case.

- A "moderate" complexity level with turnaround of five weeks should be established for cases for which market contacts are required.
- The Mergers Branch tracker system should be improved to facilitate searches and to ensure that important documents are accessible (i.e. expert contracts, precedents and Question Period cards).
- It is critical for the Mergers Branch to address fundamental staffing and budget issues.
- "We lack resources. The demands impose a great burden and cause much stress. Each officer has probably a file too many." "We need to recruit the best new graduates available and hire lawyers who want to move from the private sector to government."
- "Given that fees in the U.S. are more than twice as high as in Canada, fees are not an issue; in fact, an increase in fees is probably necessary given the number of times we have needed to get funding from Treasury Board on large, visible cases."

Summary

There are important insights provided when employees are asked about their views on how to improve the process of doing merger review. Looking at the process from the "inside" has the benefit of raising issues that might not otherwise come to light.

Most interestingly, most of the issues identified as important are the same internally as they are externally. Many employee concerns and comments are very similar to those of stakeholders and those identified from an international perspective.

Annex A

Merger Review Benchmarking Project

Questionnaire

Please take a few minutes to complete this brief questionnaire. Your input will be used to complement other research from sources both within and outside the Bureau. All completed questionnaires will be treated as confidential. A final report will be provided to managers and employees of the Mergers Branch by the end of this fiscal period.

1. How many years/months have you worked for the Mergers Branch?______
______

2. In your opinion, how could the merger review process be improved? *Rank your responses 1 to 5, where 1 is most important and 5 is least important.*

___ 1. Delegate signing authority for non-complex opinions
___ 2. Improve turnaround through the Prenotification Unit
___ 3. Improve turnaround through Assistant Deputy Commissioner and/or Deputy Commissioner's offices
___ 4. Simplify filing requirements
___ 5. Review service standards
___ 6. Review definitions of complexity
___ 7. Delegate assignment of cases to someone other than Assistant Deputy and Deputy Commissioners
___ 8. Review and make more use of case weighting criteria
___ 9. Hire more officers
___ 10. Hire more support personnel
___ 11. Provide more funding for experts
___ 12. Improve tracker system
___ 13. Other (please explain):______________________________
____
____
____
____
____
____
____
____

1. In your opinion, what issues are of most concern to merging parties? *Rank your responses 1 to 5, where 1 is most important and 5 is least important.*

Turnaround times ___
Quality of response ___
Lower fees ___
Filing requirements simplified, less burdensome ___
Reduce number of letters from Mergers Branch ___
Other (please explain)

___
___
___

2. How could costs related to complex and very complex cases be reduced? *Rank your responses 1 to 5, where 1 is most important and 5 is least important.*

___ 1. Use more internal economists
___ 2. Use Justice lawyers more often than outside counsel
___ 3. Make more use of weighting criteria and link to budgets
___ 4. Monitor work products of contractors and conduct post-assessments of the work and costs involved
___ 5. Other (please explain) ___

___
___

3. Any other comments and suggestions?

___
___
___

Optional: We may wish to contact you for further details related to your answers. In any follow-up interviews, we will maintain the confidentiality of the name of the individual. You are, however, under no obligation to provide your name and number.

Name: **Office Telephone:**

Thank You

Merger Review in the United Kingdom

Chapter 4

Senior Competition Bureau officials met with a number of their counterparts in Britain's Office of Fair Trading, Department of Trade and Industry and Competition Commission, as well as senior representatives of two private law firms during the week of November 27, 1999. Names of officials and lawyers are included in Annex A.

Merger Review Structure

In the United Kingdom, the Secretary of State heads the Department of Trade and Industry, a non-ministerial government department, and has overall responsibility for merger control and policy. The Secretary of State appoints the Director General of Fair Trading, who is responsible for both competition policy and consumer affairs.

The aim of the Office of Fair Trading is to promote the economic interests of consumers in the United Kingdom by safeguarding effective competition, removing trading malpractices and publishing appropriate guidance[18].

The Office monitors business transactions, conducts first-stage investigations and the Director General advises the Secretary of State whether he or she should refer a completed or proposed merger to the Competition Commission for an in-depth second-stage investigation. The Director General subsequently advises the Secretary of State about what action to take after the Competition Commission has produced an adverse report. The Director General can, when the Secretary of State requests it, negotiate undertakings rather than referring the case to the Commission.

The Competition Commission is an independent body of members representing industry, commerce and academia, appointed by the Secretary of State. The Commission conducts second-stage investigations of mergers referred to it by the Secretary of State and reports to the Secretary of State on whether a merger operates or might operate against the public interest. The Commission does not have any power to act against a proposed or completed merger, but recommends action to remedy adverse effects.

While most mergers do not raise issues, the U.K. merger review process is designed to provide a method for the Director General of Fair Trading to identify early those mergers with potential issues that the Competition Commission could thoroughly examine.

Definition of a Merger

The Office of Fair Trading will deem a merger to have occurred and will investigate it when it meets the following criteria:

- two or more enterprises cease to be distinct or there are arrangements in progress or being contemplated that will lead to enterprises ceasing to be distinct;

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[18] Office of Fair Trading, *Mergers: Annual Report of the director General of Fair Trading, 1998.* The Stationery Office. Ordered by the House of Commons to be printed June 30, 1999.

- at least one of these enterprises is carried on by, or is under the control of, a corporate body incorporated in the U.K. (including U.K. subsidiaries of foreign companies);
- the merger has not yet taken place or has taken place within the last four months; and
- the transaction meets the jurisdictional threshold described below.

Two enterprises cease to be distinct either when they are brought under common ownership or control or when one ceases to carry on business as a result of arrangements between them. A person or group of persons is also treated as having control of an enterprise when they have the ability to control or materially influence the policy of that enterprise. The Office of Fair Trading identifies three levels of control in its publications on merger review:

- the ability to materially influence policy
- the ability to control policy (*de facto* control); and
- a controlling interest (*de jure* control): generally defined as when one enterprise holds more than 50 percent of the voting rights in the other[19].

Thresholds for Applying the *Fair Trading Act*

The *Fair Trading Act 1973* identifies two alternative thresholds, one based on share of supply test and the other on assets, above which a merger qualifies for investigation.

a) The share of supply test is satisfied when the merger itself creates or enhances a 25 percent share of supply or acquisition of a good or a service in the U.K. (or in a substantial part of it). When one company already has a 25 percent share and the other has no share of that market, the merger will not qualify for investigation[20].

b) The asset test is satisfied when the gross value of the assets taken over exceed £70 million pounds. This is determined by adding together the book value of all the tangible and intangible assets of the target (after depreciation), including investments and current assets, whether within the U.K. or not, but with no deduction for liabilities of any kind.

The *Fair Trading Act 1973* does not apply to transactions covered by the European Community Merger Regulation (see ECMR section of this chapter).

Substantive Test

The *Fair Trading Act* includes a test to determine whether a merger operates or might operate against the public interest. When the Secretary of State refers a particular merger to the Competition Commission, the Commission must take into account "all matters that appear to them in the particular circumstances to be relevant." Section 84 identifies five non-exhaustive points for the Commission to consider:

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[19] Office of Fair Trading. *Mergers: A guide to procedures under the Fair Trading Act 1973*. The Stationery Office. Publication 521, May 1999.

[20] It is important to note that the threshold for opening an investigation (being the share of supply or acquisition within the U.K. or a part thereof) should not be confused with the merging parties share of a relevant market for purposes of substantive review. The definition of relevant market and therefore of market share would be determined only as the result of the investigation.

c) maintaining and promoting effective competition;
d) promoting the interests of consumers, purchasers and other users of goods and services in the United Kingdom with regard to the price, quality and variety of goods and services supplied;
e) promoting through competition the reduction of costs and the development and use of new techniques and new products, and facilitating the entry of new competitors into existing markets;
f) maintaining and promoting the balanced distribution of industry and employment in the United Kingdom; and
g) maintaining and promoting competitive activity in overseas markets on the part of United Kingdom producers and suppliers.

The Act does not contain a separate test for the Office of Fair Trading to follow when considering whether to recommend that the Secretary of State refer a case to the Competition Commission. Rather, the Office makes its assessment using the criteria listed above. Section 76 of the Act states that the "duty" of the Director General of Fair Trading is "to make recommendations to the Secretary of State as to any action under this Part of this Act which in the opinion of the Director it would be expedient for the Secretary of State to take in relation to any such arrangements or transactions."

Review Process

When reviewing a proposed merger, the Office of Fair Trading determines the relevant product and geographic markets and examines their structural characteristics:

h) market share, including the increase in market share occasioned by the proposed merger;
i) the extent and impact of any barriers to market entry, including those provided by imports;
j) the effectiveness of the remaining competitors;
k) buyer power; and
l) the impact of any vertical links.

While recognizing that efficiency gains are an important consideration, "generally speaking, in making an assessment of a merger, [the Office of Fair Trading] does not closely involve itself in evaluating claims for gains in efficiency, although it would like to see any information that might be available about anticipated improvements in this area. Any judgement that needs to be made about the trade off between efficiency claims and the potential detriment to competition is usually left until after a more detailed investigation. This is one of the factors that the Director General would take into account when he advised the Secretary of State whether a reference to the Competition Commission would be justified[21]."

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[21] Office of Fair Trading. *Mergers: A guide to procedures under the Fair Trading Act 1973.* The Stationery Office. Publication 521, May 1999.

With regard to non-competitive factors, the Office's guide to procedures states the following:

> A merger's effect on employment or regional development, or its implications for national security, are among other issues that could have public interest implications. But since it is government policy that reference to the Competition Commission should be based primarily on competition grounds, it would only be in exceptional circumstances that such considerations might be a decisive factor. Nevertheless, the [Office of Fair Trading] notes any representations it receives on public interest issues and... the Director General takes them into account when he formulates his advice to the Secretary of State[22].

Thus, the main aim of the Office of Fair Trading's evaluation of a merger is to establish its potential effect on competition, although other possible public interest issues are also assessed. The Office does not examine any merger that falls below the legislated thresholds.

The Office publishes several guidelines and publications that it encourages merging parties to use when determining whether a merger qualifies for investigation.

Notification

There is no requirement for companies to notify the Office of mergers except in the case of those involving newspapers. However, parties regularly file with the Office to ensure that a proposed transaction is in accordance with competition law. The vast majority of qualifying mergers are brought to the Office's attention, either through informal submission or voluntary prenotification.

There is no prescribed form for *informal submission* but guidance is included in a booklet entitled *Merger Submissions* and parties may use the common notification form developed for use in the U.K., France and Germany. However, the common form has rarely been used. The Office of Fair Trading's administrative service standard states that merging parties can expect a response within 45 days of filing a complete submission (39 days for the Office and 6 for the Secretary of State to look at it). The parties do not pay a fee unless and until the Secretary of State refers the merger to the Competition Commission or announces the decision not to make a reference.

Voluntary prenotification is a legislated review process that applies only to a proposed merger that has already been made public. It does not apply to completed mergers or to proposed mergers that have not yet been made public. A fee is payable at the time of submission.

"The voluntary prenotification procedure (provided under the [*Fair Trading Act*]) makes provision for a proposed merger to be considered within 20 working days, with a maximum extension of 15 working days. Subject to some exceptions, the merger would be automatically cleared where no reference has been made by the end of that period[23]."

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[22] *Ibid*

To use this process and benefit from its legislated time frame, a company must pay the relevant fee in advance and use the prescribed Merger Notice, which specifies the information that must be provided. "The form itself has been designed to provide the Director General with sufficient information to allow him to decide, at an early stage, that there are no grounds to recommend reference[24]."

The Office of Fair Trading has laid out very specific procedures for filing prenotifications. For example, the prenotification period begins on the first working day after the Office receives the Merger Notice, including the fee. The Office deems any Notice received after 5:00 p.m. to have been received the following day. The review period expires at 5:00 p.m. 20 working days later. The Office confirms receipt of the Notice in writing, indicating when the review period will expire (in 20 days or 35 with an extension).

On receiving the Notice, the Director General may send a written request for additional information, specifying the date by which it must be submitted. If the information is not provided within the defined period, the Director General has discretion and may reject the Notice.

The Director General may reject a Merger Notice at any time during the 20-day review period for one of four reasons:

1. he or she suspects the information given to be false or misleading;
2. he or she suspects that the parties do not propose to carry out the arrangements described in the Notice;
3. the parties fail to provide on time, or at all, the information specified in the Notice or any supplementary information the Office requests; or
4. the notified arrangements appear to be a concentration with a community dimension as set out in the European Community Merger Regulation (see ECMR section of this chapter).

A company may withdraw a Merger Notice at any time, provided that it or its authorized representative makes the withdrawal in writing.

Confidential Guidance

This is a non-legislated process by which, before a merger becomes public knowledge, companies can seek the confidential guidance from the Secretary of State via the Office of Fair Trading on whether the matter would likely be referred to the Competition Commission. The Office's guidance is not a "binding guarantee" that the merger will not be referred to the Commission. This is because the Office has only a limited amount of information, due to the confidentiality of the matter. As a result, the Office does not make market contacts, but does seek the views of other government departments. The Office undertakes to provide written guidance within 25 working days (19 for itself and 6 for the Secretary of State; see Impact of OFT and Secretary of State Decisions' section of this chapter).

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[23] *Ibid.*

[24] *Ibid.*

This guidance is generally one of four responses:

- that there would likely be no grounds to refer once the matter became public;
- that it is impossible to state a view on the likelihood of reference;
- that reference is likely warranted at the public stage but that the concerns could be addressed by undertaking; and
- that reference is likely warranted once the matter is public.

Informal Advice

The Office of Fair Trading encourages and provides informal advice. Parties are encouraged to send in information about the transaction but the Office does not make third-party contacts. In almost all cases, it conveys the informal advice orally at a meeting with the parties and does not provided a written response. Informal advice is seen as a key component of the Office's approach, in that it enables parties and the Office to agree on key issues to be addressed in any subsequent submission, should the parties decide to proceed.

Administration of a Merger Review

The Office of Fair Trading's Mergers Secretariat comprises administrative, legal, economic and accountancy staff (6 economists, 6 support staff, and 13 case officers as of December 1999). The usual workload of a merger case officer is between 5 and 10 cases. As of December 1999, there were 111 active cases for the 13 case officers. The Office does not retain outside experts. In-house staff provide all the economic advice.

The Office has its own internal legal division, and the staff lawyers are expected to provide legal advice within specified administrative deadlines. Two lawyers are specifically responsible for advising whether a proposed transaction qualifies for investigation under the *Fair Trading Act*. The division works with the Mergers Secretariat to draft and negotiate undertakings.

When the Office receives a case, the Director of Mergers assigns it to a case officer who takes primary responsibility for it. In some instances, assignment to a particular individual will reflect the fact that he or she has knowledge of the industry involved. The Office sends the parties a letter acknowledging receipt of the documentation, along with the name of the officer who is responsible for the case. The parties are encouraged to make the identified person their primary contact on the file. In addition, an economist works on the file with the case officer. This is the extent of the team that works on most merger reviews at the Office. Larger teams are not generally created.

The Mergers Secretariat, as a matter of course, invites interested third parties to comment on a merger. Invitations are published through the Stock Exchange's Regulatory News Service on Reuters and on the Office's web site. The Secretariat also requests information about customers and competitors (generally a minimum of five of each) and contacts customers, competitors and suppliers to obtain their views and opinions on the proposed merger. Office staff also solicit the views of other government departments and regulators. When the Office receives adverse views, it will normally advises the parties and gives them an opportunity to comment. When there appears to be little likelihood of anyone raising concerns about the merger, the Office issues the formal Invitation to Comment and accepts any replies it receives, but does not actively seek input from third parties.

The Director of Mergers meets with his case officers once a week to review all cases, and is well aware of progress, initial conclusions, and economic issues, etc. related to each. The Director also receives and reviews all of the economic advice the staff economists provide.

When the assessment is completed the case officer signs off the case with two possible outcomes: a recommendation to refer the case to the Competition Commission or a recommendation to close the case. When a case officer concludes that a matter should be closed, he or she sends the assessment paper and recommendation to the Director of Mergers and then to any interested departments. When the departments agree to the recommendation, a clearance paper is sent to the Department of Trade and Industry for a decision by the Secretary of State. The Department of Trade and Industry announces the Secretary of State's decision. When a department does not agree, it may recommend that the matter be referred to the Mergers Panel. The case officer may recommend this as well if he or she concludes that the proposed merger raises serious competition concerns. More than 80 percent of the cases the Office of Fair Trading reviews each year do not raise such concerns.

Merger Panel

The Merger Panel is made up of officials from the Office of Fair Trading, the Competition Commission, the Treasury and the Competition Branch of the Department of Trade and Industry. The attendance of other Departments depends on the issue at hand.

The Panel's role is to help the Office's Director General frame his advice to the Secretary of State about whether a matter should be referred to the Competition Commission or undertakings be sought. The work of the Mergers Panel allows Office staff to formulate recommendations with the benefit of the knowledge and experience of other government departments.

The Panel considers approximately ten percent of cases subject to full merger review (i.e. approximately 20 to 25 in 1998). Of these, between 30 and 50 percent are identified as warranting referral to the Competition Commission or undertakings in lieu of reference. In 1998, for example, nine cases were recommended for referral to the Commission.

Impact of Office of Fair Trading and Secretary of State Decisions

Having consulted, completed market contacts and sought the advice of the Mergers Panel, the Director General of Fair Trading may recommend one of the following to the Secretary of State:

- that the merger be allowed;
- that the matter be referred to the Competition Commission for a second- stage investigation; or
- that the matter warrants reference but that undertakings would resolve the identified competition concerns.

When the Director General recommends no action, the Secretary of State may do one of two things:

- accept the recommendation; or
- refer the matter in the absence of a recommendation.

When the Director General recommends that the case be referred to the Competition Commission, the Secretary of State may do one of the following:

- accept the recommendation and refer the matter to the Commission;
- not accept the recommendation; or
- ask the Director General to seek undertakings in lieu of reference to the Commission.

When the Director General recommends undertakings in lieu of reference, the Secretary of State may take one of three actions:

- accept the advice and ask the Director General to develop undertakings (three cases in 1998);
- decide not to accept the Director General's advice and to make a reference to the Commission; or
- clear the merger without undertakings.

Under provisions of the *Companies Act 1989* and the *Deregulation and Contracting Out Act 1994*, the Secretary of State may accept binding undertakings from a merged business as an alternative to referring a case to the Competition Commission. The Office of Fair Trading will usually seek structural undertakings, generally the more appropriate remedy for competition problems in a merger situation, but may recommend behavioural remedy when the structural route is not available. The Secretary of State may only use these provisions when the Director General of Fair Trading recommends a referral to the Commission and specifies existing or potential adverse effects on the public interest.

When the Director General recommends undertakings, the Department of Trade and Industry issues a public announcement stating that the Secretary of State is minded to make a reference to the Competition Commission unless satisfactory undertakings are obtained. This provides an opportunity for third parties to comment on the merger. Proposed undertakings are published in draft form and are open for comment. Once they are in place, undertakings are monitored by the Office of Fair Trading.

When the Secretary of State decides to make a reference, a public announcement briefly explains the reasons for the decision. Although he is not obligated to do so, the Secretary of State also publishes decisions not to refer mergers to the Commission. The Secretary of State also specifies whether the decisions are in accordance with the Director General's advice.

Decisions by the Secretary of State to close or refer merger cases or to accept undertakings are published by press notice. The Office of Fair Trading informs the merging parties. The Stock Exchange's Regulatory News Service is also notified. Since September 2000, the Office of Fair Trading has subsequently published a summary of the terms of its advice on important cases, on its website.

The Role of the Competition Commission

The *Fair Trading Act 1973* requires the Competition Commission to take into account "all matters which appear to them in the particular circumstances to be relevant in determining whether a merger operates or may be expected to operate against the public interest.[25]" However, as with the Office of Fair Trading, the Commission's current practice is to focus more on the impact of a proposed transaction on competition.

When the Commission receives a reference, it creates a panel to hear the matter and also creates a team to conduct the second-stage investigation. A typical team consists of a team leader, an experienced investigator, called the recording secretary, an economist, an accountant and a lawyer, as well as one or more industry experts as required. Certain staff are full- time employees of the Commission, while others are retained on contract for the investigation.

The Commission conducts a hearing at which the parties present their case and experts may be called. The Office of Fair Trading usually appears before the Competition Commission near the beginning of an enquiry to explain its reasons for recommending reference and to give the Commission a broad introduction to the case. The Office of Fair Trading also usually appears towards the end of an investigation to discuss remedy. Witnesses are questioned but not cross-examined. After hearing submissions, the Commission considers potential remedies and provides them to the parties for comment. In addition, once the Commission begins drafting its report, it provides draft chapters to the parties for comment. Parties may not request meetings with ministers or Commission officials. Rather, the parties and other interested groups are encouraged to make written submissions.

When considering the impact on competition, the Commission will consider both the acquisition of market power by a single firm and the potential for enhanced inter-firm cooperation as the result of the merger. The Commission also considers the parties' efficiency claims and assesses whether any promised efficiency improvements would outweigh the effects of a reduction of competition. However, when parties claim such improvements, the Commission must be satisfied that consumers will share in the benefits within a reasonable period. It will not accept efficiency claims if only the merging parties will benefit from them.

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[25] Office of Fair Trading, *Mergers: A guide to procedures under the Fair Trading Act 1973*. The Stationery Office. Publication 521, May 1999.

To date, the Commission's investigations have been completely closed, but the Commission is exploring a number of alternatives to make the process more open. It lists the names of witnesses on its Web site, except when confidentiality is required and encourages parties to publish their main arguments before the Commission. The Commission also sends parties a letter listing the key issues it has identified. While it may not release the letter, it releases the list of issues.

The time allowed for the Commission's inquiry is usually three months, although the Secretary of State might grant a three-month extension.

Impact of Competition Commission Decisions

The Competition Commission submits its report and recommendations to the Secretary of State, with a copy to the Office of Fair Trading. These reports contain a summary of the investigation, analysis of the effects of the merger, descriptions of the companies and markets involved, arguments for and against the merger, and third-party views. The Secretary of State, in turn, is required to table all merger reports before Parliament and to arrange for their publication in full within 20 days.

When the Competition Commission concludes that a merger operates or is expected to operate against the public interest, it normally recommends to the Secretary of State action to remedy or prevent the adverse effect. As noted earlier, the Commission is not a decision-making body.

When the Commission finds that a merger should be allowed, the Secretary of State must accept this finding. When the Commission concludes that the merger does or could have adverse effects, it may recommend that the transaction be blocked. In the majority of cases, however, it identifies remedies that would allow the transaction to proceed. Note that the Office of Fair Trading also advises the Secretary of State on the appropriateness of recommended remedies, and may suggest alternatives to those the Commission put forward.

The Secretary of State is not bound by a recommendation to disallow a transaction or to accept certain remedies. The Secretary of State may choose to impose other remedies or allow a merger to proceed in spite of recommendations from the Competition Commission and the Office of Fair Trading, although this is unusual. When remedies are sought, the Secretary of State may, under the law, either impose an order or seek undertakings from the parties. In practice, however, undertakings are the usual remedies.

All undertakings and orders are published and all orders are tabled before Parliament. The Director General of Fair Trading is responsible for monitoring compliance with undertakings and orders and must keep them under review.

There is no statutory right of appeal of a Competition Commission recommendation or a decision of the Secretary of State. The High Court will, however, review the merits of the decision-making process, but no application for this review has been successful to date[26].

Merger Review Fees

Fees are payable in the following circumstances:

- when filing a voluntary pre-notification;
- when the Secretary of State refers the case to the Competition Commission; and
- when the Secretary of State announces that he will not refer the case to the Commission.

Fees vary according to size and type of merger:

- £5,000, when the value of the gross assets acquired total £30 million or less;
- £10,000, when the value of the gross assets acquired total more than £30 million but not more than £100 million; and
- £15,000, when the value of the gross assets exceeds £100 million.

Review of Current UK Merger Review Test and Process

The UK is currently completing a formal review of the its merger review process. A discussion paper entitled *Mergers: A Consultation Document on Proposals for Reform* was published by the Department of Trade and Industry.

There were two key issues for the review: to revise the legal framework for decisions (it proposed to replace the current scheme with a competition-based test, essentially regularising current practice) and to minimise ministerial involvement by removing key decision-making for the Secretary of State (Minister for Trade and Industry.)[27] The Government stated in the consultation document that it was seeking a regime which will be characterised by "clarity, transparency and consistency" which will promote "predictability, fairness and accountability", be responsive to the needs of business and others, and be effective.

In October 2000, the government released a paper entitled *Mergers: The Response to the Consultation on Proposals for Reform*[28]. The document announced a number of decisions reached by the government after the consultation and also identified a number of new issues where it requested comment and input. The Minister, Stephen Byers, stated in releasing the report that:

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[26] *Getting the deal through. The international regulations of merger review and joint ventures*, 3rd ed.

[27] It was proposed that the Secretary of State would retain certain authorities for merger cases involving national security, reserve power to specify additional public interest criteria, and a discipline of the use of this reserve power.

[28] Department of Industry and Trade. *Mergers: The Response to the Consultation on Proposals for Reform*. October 2000.

> "In August 1999, I proposed changes designed to streamline and modernise the UK merger control regime. In particular, I proposed that decisions in the vast majority of merger cases should be taken by independent competition authorities against a competition-based test. These proposals received widespread support from respondents to the consultation.
>
> In light of the responses to the August 1999 consultation I have decided to take forward my proposals for reform. I believe that the new regime will provide the framework for a clear and consistent merger control system in the UK. Decisions will be more sharply focussed on competition issues. Businesses will be given more certainty about timetables for decisions. The vast majority of the cases will be removed from the political arena.
>
> But in view of the support for the proposals in the August 1999 consultation, I have also decided to take steps in advance of legislation. I am announcing today that from now on my policy will be to accept the advice I receive from the Director of Fair Trading on whether or not to refer merger cases to the Competition Commission save in exceptional circumstances.
>
> I am also announcing today that small and medium sized businesses will be relieved of the obligation to pay merger fees, thus reducing the regulatory burden that the current system places on them."

The following are some of the key changes adopted by the government after receiving input through the consultation process. These will be the subject of legislation.

- Decisions, except in exceptional cases, will be taken by the competition authorities, (the Director General of Fair Trading and the Competition Commission) and the Secretary of State would no longer be involved either at the stage of referral to the Competition Commission or after the Commission has reached a decision[29].

- The test for merger review would become one of determining whether the proposed merger would substantially lessen competition in a market.

- There would be no change to the present division of responsibility between the Office of Fair Trading and the Competition Commission.

- With respect to the timetables for review, for those companies that notify under the Merger Notice, the statutory timetable is to be reduced from 35 to 30 working days. For those companies proceeding under the voluntary notification regime, the administrative timetable is reduced from 45 working days to 40 working days.

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[29] Primary legislation is required to enact the proposal but, in the interim, Secretary of State for Trade and Industry Stephen Byers has said he will accept the Director General's advice on whether to refer mergers to the Competition Commission in all but exceptional cases. *Fair Trading from the OFT*. Issue 29, February 2001. P.3.

- The government has concluded that it will maintain two alternative tests to determine whether a merger qualifies for investigation. The current share of supply test will be maintained but the current asset based test will become a turnover test based on U.K. turnover. While deciding to adopt the change the government intends to consult on the level which is proposed as ECU45 million.

On the question of the role and significance of efficiencies, the government is seeking further comment. The paper states that efficiencies would be considered as part of the competition analysis and "can contribute to the conclusion as to whether there is or is not a substantial lessening of competition. However, where a merger results in a substantial loss of competition in a market, it is unlikely that efficiencies generated by the merger will be passed on to consumers, as the merging parties will not be under competitive pressure to do this". The paper proposes that the new regime should keep separate the competition analysis and the question of offsetting benefits and is seeking comments on the proposal that " the competition authorities should be able to take benefits to UK consumers affected by the merger into account at the remedies stage of the process, where they have concluded that the merger will result in a substantial lessening of competition."

European Community Merger Regulation (ECMR)

The European Community Merger Regulation (ECMR) covers all aspects of merger control in the European Union (EU). Mergers that fall within the jurisdiction of the ECMR are not usually investigated under a national system.

Mergers are assessed under the ECMR to determine their compatibility with the Common Market. The compatibility test is based on competition criteria that stipulates "that the ECMR would have serious concerns where a merger creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the Common Market or in a substantial part of it.[30]"

The ECMR applies when a concentration[31] has a "Community dimension." Thresholds defining when a "Community dimension" exists are calculated according to the turnover of merging companies. A concentration has a Community dimension in the following circumstances:

- the combined worldwide turnover of the undertakings concerned amounts to at least ECU5 billion;, and the aggregate Community-wide turnover of at least two of those undertakings is more than ECU250 million; or

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[30] Office of Fair Trading. *Outline of United Kingdom Competition Policy*. The Stationery Office. Publication #00280, June 1998.

[31] The term *concentration* covers mergers, acquisitions and full-function joint ventures (joint ventures that function as independent businesses). A concentration arises when two or more previously independent undertakings merge to become one new independent undertaking, or when an undertaking acquires direct or indirect control of the whole or parts of one or more other undertakings.

- the combined worldwide turnover of the undertakings concerned is more than ECU2.5 billion, and the combined turnover of all those undertakings in each of at least three Member States is more than ECU100 million, and the aggregate turnover of at least two of the undertakings concerned in each of at least three of those Members States is more than ECU25 million, and the combined Community-wide turnover of each of at least two of the undertakings is more than ECU100 million."

Officials must be notified of mergers falling within the jurisdictions of the ECMR within one week of the conclusion of the agreement, the announcement of a public bid, or the acquisition of a controlling interest. A merger must not be implemented prior to notification or until it has been declared compatible with the common market.

In the U.K., the Competition Commission has one month from receipt of a properly completed notification to conduct a first-stage investigation and decide whether the merger falls within the scope of the ECMR. This investigation may take up to six weeks. When there is serious doubt as to its compatibility with the common market, the Commission initiates a second-stage investigation. Fines of up to ten percent of turnover are imposed if the parties fail to honour their commitments given, or if they put into effect a merger that has been blocked.

General Views of the Private Sector

The merger review process in the U.K. is highly regarded by both the government and in the private sector. The process is perceived to work well and, as in Canada, lawyers familiar with the Office of Fair Trading are used to combining informal approaches to sound out officials with subsequent, more formal interaction. Government officials and lawyers identified openness, transparency and consistency as critical attributes of the merger review process. Timing and fees are not seen as issues, the latter generally being considered as minimal compared to other costs related to a proposed merger.

Confidential Guidance

Confidential guidance is seen by the private lawyers as one of the strengths of the Office of Fair Trading. There is great appreciation for an established system by which parties can get a clear view of the Office's sense of the issues that would likely be raised if the parties proceed with the transaction. The guidance Office staff provide is very helpful since they base their views on a detailed submission. As such, it is an excellent basis for identifying key issues, particularly matters for which the Office would need additional information if the parties proceed. In this way, lawyers are in a position to develop a subsequent submission focussed on the important issues when the transaction becomes public. Furthermore, such an approach will likely result in a more focussed, shorter review. Both the lawyers and Office managers see the letter the Office provides to the parties as very useful, as it provides both advice and guidance.

Voluntary Pre-Notification Versus Informal Filing

In the U.K., there is no formal process similar to that of the Canadian Competition Bureau's Pre-Notification Unit prior to assignment of the case. However, as noted, there is voluntary pre-notification, although it is not clear why parties have not made greater use of this process.

While it appears that most parties prefer to advise the Office of Fair Trading of a proposed merger by means of an informal submission, rather than the voluntary pre-notification procedure set out in the legislation, the most recent figures suggest a more balanced approach is emerging. In 1998, there were 45 voluntary pre-notifications and 179 informal submissions, while in 1999 (up to November) there were 62 voluntary pre-notifications, and 87 informal submissions. (These figures do not include cases submitted for Confidential Guidance, which relates only to matters not public that would be later examined under one of the other two headings if and when the matter became public.). The limited use of voluntary pre-notification may be due to parties' concern that, faced with a legislated deadline, Office of Fair Trading staff might choose to recommend referral rather than miss the fixed date. Moreover, the legislative timetable for completing the review of even the most complex transactions is considerably shorter than the Office's administrative standard for non-notified transactions, a standard based on actual experience. On the other hand, when a company is confident of its position, the fixed legislated period, which offers certainty about the timing of a reply, is also attractive.

The consultation paper on merger review reform also recognized that companies saw benefits in having a choice of approaches for getting a proposed transaction reviewed and recommended that the two track-system remain. Discussing time frames, the paper states:

"The government recognizes that it can be in firms' own interests for there to be some flexibility in the timetable to give them more time to prepare their arguments and evidence. This is clearly reflected in the low take-up of the existing pre-notification procedure offering a 35 working day deadline for reference decisions. In 1998 only 22 percent of qualifying cases were notified under the procedure. The government therefore takes the view that parties should continue to have the choice of either fixed statutory or administrative timetables for reference decisions.[32]"

Extent and Value of Published Information

There is strong support in the private sector for competition authorities to publish as much information as possible about their approach to assessments and their decisions in individual cases. The Office of Fair Trading has responded by publishing a summary of advice on important cases. This practice however is not without additional cost. Law firms, particularly, noted the practice of the Office of Fair Trading of publishing working papers on particular subjects. Firms would like to see the reasoning behind more individual case decisions. As Canadian lawyers have said, there is value in knowing about cases that were not opposed and what arguments were persuasive. The view is that there is limited information on cases referred and even less on cases not referred. As in Canada, lawyers would like letters indicating that no action will be taken to be detailed and informative for the same reasons.

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[32] Department of Trade and Industry. *Mergers: A Consultation Document on Proposals for Reform.* August 1999.

To date, the legal profession has been concerned about its inability to get substantial pertinent information on the Competition Commission's process and analytical approach. Since the Commission's hearings are closed, lawyers only get to observe the cases in which they are involved. The letter the Commission sends to the parties is only a list of issues and provides little in the way of analysis. The first *real* opportunity for lawyers to see the analysis is when the Commission provides draft chapters for comment. This issue is important because, although the Commission can only recommend actions, its findings of fact are binding.

Recently the Commission has become more open. For example, it has begun publishing the letter to the parties that identifies possible remedies in the event that the Commission finds against the merger.

Office of Fair Trading Process

The private bar has a high regard for the Office of Fair Trading's staff and process. Lawyers cite a number of points, starting with strong leadership both from the top and the Director of Mergers. They see the opportunity for them to come in early and to informally discuss a case as a key step in getting the subsequent review on the proper track. Such an early approach helps focus both the submission and the information requirements, gives a sense of the size of the problems the proposal may face and, in a limited number of cases, starts the identification of possible remedies.

One change the lawyers suggest is to enable greater delegation of decision making. A significant step in this direction would be to adopt the proposal regarding ministerial power to refer matters to the Competition Commission.[33]

Adversarial Versus Non-adversarial Process

There were divergent views among the lawyers on the nature of the current process. Some see the lack of an open adversarial process as one of the factors contributing to the lack of information about the Commission's process and analytical approach. Unlike in the EU, there is no formal statement in the U.K. of objections at the end of the first- stage review. Rather, there is a press release announcing the reference, with some but not much detail.

On the other hand, there is strong support for the view that the lack of an adversarial approach is a benefit. Those who hold this view feel that an adversarial process would add substantial time before a decision could be reached. (At present, the Commission has three months, with the possibility of one three-month extension.) Given these opinions and the general agreement with the two-stage approach, there is little support for adopting an adversarial process.

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[33] At the time of publication of this report, the Minister for the Department of Trade and Investment had announced his adoption of a practice in line with such a proposal.

Annex A: - Persons Interviewed

Mr. John S. Bridgeman Director General of Fair Trading Office of Fair Trading Field House 15 - 25 Bream's Bldgs. London EC4A 1PR England	Ms. Margaret Bloom Director of Competition Policy Office of Fair Trading Field House 15 - 25 Bream's Bldgs. London EC4A 1PR England
Mr. Andrew J. White Director, of Mergers Office of Fair Trading Field House 15 - 25 Bream's Bldgs. London EC4A 1PR England	Mr. Adrian Walker-Smith Director, Cartel Investigations Office of Fair Trading Field House 15 - 25 Breams Building London EC4A 1PR England
Mr. Edward Whitehorn Director, Policy Co-ordination Office of Fair Trading Field House 15 - 25 Bream's Bldgs. London EC4A 1PR England	Ms. Penny Boys Secretary Competition Commission New Court 48 Carey Street London WC2A 2JT England
Mr. David Miner Department of Trade and Industry 1 Victoria Street London SW1 England	Mr. Richard Leyland Department of Trade and Industry 1 Victoria Street London SW1 England
Ms. Jane Swift Department of Trade and Industry 1 Victoria Street London SW1 England	Mr. Nicholas Spearing Senior Partner Freshfields 65 Fleet Street London EC4Y 1H5 England
Mr. Richard Taylor CMS Cameron McKenna Mitre House 160 Aldersgate Street London EC1A 4DD England	

Annex B: - Statistical Information

Table 1. Office of Fair Trading: Merger Cases Reviewed

	1999	1998	1997
Proposed or completed	226	252	218
Pre-notified	69	45	51
Confidential guidance	50	61	64
Informal advice	70	67	
Total merger cases	415	425	396

Table 2. Office of Fair Trading: Merger Cases

	1999	1998	1997
Value	£116.5 billion	£180 billion	£106 billion
Horizontal mergers	94%	92%	95%
Undertakings (not referred)	7	3	
References to Competition Commission	10	8	10

Table 3. Office of Fair Trading: Turnaround Times

Service	Timing	Authority
Voluntary pre-notification	Maximum of 35 working days (includes 15-day extension)	Legislative
Review of public merger	Maximum of 45 days (39 for the Office of Fair Trading and 6 for the Secretary of State)	Administrative deadlines
Informal written advice	Maximum of 45 days	Administrative Deadlines
Confidential guidance	Maximum of 25 days (19 for the Office of Fair Trading and 6 for the Secretary of State)	Administrative Deadlines

Merger Review in the United States

Chapter 5

In Washington in April 2000, senior Competition Bureau officials met with about 30 individuals involved in merger review in the United States, including officials of the Federal Trade Commission (FTC) and the Department of Justice (DOJ) as well as representatives of the American Bar Association. See Annex A for the names of these officials and counsel.

Due to timing and scheduling difficulties, most of the interviews were with FTC personnel, but these individuals were able to provide a substantial amount of information about the common features of the U.S. competition legislation and policies. Key DOJ personnel provided their views and experience.

This chapter describes the structure and legal and regulatory requirements of the merger review process in the U.S. It also describes the procedure the FTC and DOJ follow, and includes commentary from members of the private bar.

U.S. Merger Review Structure

The FTC and DOJ are responsible for federal antitrust enforcement in the U.S. Both have authority to investigate antitrust violations throughout the U.S. as well as in foreign jurisdictions when those violations have a direct impact on competition in the U.S. Both agencies have substantial investigative powers and, through compulsory process, have the ability to obtain documents and testimonial evidence that might be relevant to an investigation.

While mergers in the United States at the federal level can be examined under the *Clayton Act*, the *Sherman Act* and the *Federal Trade Commission Act*, in practice both the FTC and the DOJ review mergers under the *Clayton Act*. Title II of the *Hart-Scott-Rodino Antitrust Improvements Act of 1976* (section 7A of the *Clayton Act*) established the federal pre-merger notification program.

During 1999, there were approximately 4,700 filings under the Hart-Scott-Rodino provisions. Of these, only about 160 resulted in a second request being issued by either agency after the initial 30-day review period. The Commission or an individual Commissioner may issue a second request, as may the Assistant Attorney General or his or her designee. All matters that the agency intends to contest must be approved by a majority vote of the commissioners, in the case of the FTC, or by the Assistant Attorney General, in the case of the DOJ.

The Federal Trade Commission

The FTC is an independent administrative agency in which major enforcement decisions are made by a majority vote of the members of the Commission. The FTC's authority is vested in the *Federal Trade Commission Act*, which prohibits unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce. The statute requires the FTC to take action to prevent persons, partnerships and corporations from pursuing unfair methods of competition. Mergers are reviewed under section 7 of the *Clayton Act*.

The Commission is composed of five members who are appointed by the President with the advice and consent of the Senate. The commissioners are appointed for seven years, and no more than three may be from the same political party. If a Commissioner is unable to serve his or her full seven-year term, a successor is appointed for the remainder of the term.

The President appoints the FTC Chairman from among the five members. The Chairman serves as chief executive officer of the agency and has powers and influence that the other commissioners do not. The Chairman appoints staff, distributes workloads and exercises direction regarding expenditures. While the approval of the remaining commissioners is required for major staff appointments, the Chairman is free to fill other vacancies.

The FTC acts as investigator, prosecutor and judge. FTC attorneys investigate antitrust issues and may recommend that the Commission issue a complaint. If a settlement is not reached with the parties, the Commission may order an administrative trial on the merits, presided over by an administrative law judge, who is also a Commission employee. If the administrative law judge decides against the parties, they must first appeal the decision to the full Commission. If the Commission upholds the decision, the parties may then appeal the case to the Federal Court of Appeals.

The Commission is organized into three bureaus: the Bureau of Competition, the Bureau of Economics and the Bureau of Consumer Protection. The Commission also has regional offices[34] located throughout the U.S. The Bureau of Competition has primary responsibility for enforcing federal antitrust and trade laws. The Bureau of Economics provides significant support to the Bureau of Competition attorneys who conduct merger and non-merger investigations, while making separate recommendations to the Commission, and help prepare antitrust cases for trial. Staff economists also prepare reports and studies related to the Commission's mission to maintain competition. Each of the Bureaus is headed by a director who is responsible directly to the FTC Chairman. Each Bureau has several assistant directors who supervise staff attorneys and economists, and are directly responsible for day-to-day operations.

The Department of Justice

The Department of Justice, part of the executive branch of the government, is organized into divisions responsible for enforcing specific statutes. Major antitrust enforcement decisions, then, are the responsibility of the Assistant Attorney General of the Antitrust Division. Once a decision is made to prosecute a matter, the DOJ takes the case directly to Federal District Court where prosecution is governed by the Federal Rules of Civil Procedure or, in a criminal case, by the Federal Rules of Criminal Procedure.

There are several sections within the Antitrust Division, headed by section chiefs, as well as several field offices which have the same responsibility as head office. As merger antitrust investigations are opened, the Director of the Office of Operations and Merger Enforcement assigns them to the appropriate section or field office and staff attorneys carry out the investigation and carry out any litigation. Similarly, there is a Director of Civil Non-Merger Matters and a Director of Criminal Enforcement.

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[34] Antitrust matters from the regional offices must be cleared through, and are monitored by, the Bureau of Competition in Washington, D.C., in the same manner as are cases from the Bureau's merger operating divisions.

Unlike the FTC, the Antitrust Division acts solely as investigator and prosecutor. The Division has no authority to issue enforcement orders. All enforcement activity must be conducted through federal courts.

The Notification Process

The provisions and rules of Title II of the *Hart-Scott-Rodino Antitrust Improvements Act of 1976* (section 7a of the *Clayton Act*) require both parties to file notification under the pre-merger notification program when all of the following conditions are met:

- one person has annual sales or assets of at least US$100 million;
- the other person has annual sales or assets of at least US$10 million; and
- as a result of the transaction, the acquiring person will hold a total amount of stock or assets of the acquired person valued at more than US$15 million, or, in some stock transactions, even if the stock held is valued at US$15 million or less, if it represents 50 percent or more of the outstanding stock of the issuer being acquired and the issuer is of a certain size.

There are numerous exemptions, some contained in the statute itself, and others established by the FTC with the concurrence of the DOJ. Among these are exemptions for multinational mergers that would have minimal impact on the United States.

The notification fee is US$45,000 if the size-of-transaction is valued at greater than $50 million but less than $100 million; US$125,000 if the size-of-transaction is valued at $100 million or greater but less than $500 million; and US$280,000 if the size-of-transaction is valued at $500 million or greater. The acquired person also makes a filing but the acquiring party makes the filing and is responsible for paying the fee.

"Parties to certain proposed transactions must submit an Antitrust Pre-merger Notification and Report Form with information about their businesses to the enforcement agencies and wait a specified period of time before consummating their proposed transaction.[35] During this waiting period, the antitrust enforcement agencies analyze the likely competitive effects of the proposed transaction. If either agency believes that it needs further information in order to complete its competitive analysis, then it may request additional information and documentary material. This "second request" extends the statutory waiting period until a specified time after the parties respond.[36] When, after analyzing all of the information available to it, either agency believes that the transaction will violate the antitrust laws, then it will seek to enjoin the transaction in Federal Court.[37]

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[35] *To File or Not to File: Introductory Guides to the Pre-merger Notification Program*. Pre-merger Notification Office of the Federal Trade Commission. Guide II, January 1991.

[36] This period is 20 days after receipt of the requested information. There are shorter deadlines for cash tender offers and for filings when the acquiree is bankrupt.

Once an Antitrust Pre-merger Notification and Report Form is filed, the enforcement agencies begin their review. The Federal Trade Commission is responsible for the administration of the pre-merger notification program. As a result, the Commission's Pre-merger Notification Office makes an initial determination whether the Form complies with the Act and Rules.[38]

As soon as a staff member has concluded that the reporting parties appear to have complied with all requirements, the Commission sends letters to all parties indicating the date that the Forms were deemed filed correctly and the date the waiting period expires.

Both agencies undertake a preliminary substantive review of the proposed transaction. Only one of the two enforcement agencies investigates the proposed transaction. If, after preliminary review, both agencies conclude that a particular transaction warrants closer examination, the agencies decide between themselves which one will be responsible for the investigation.[39] Other than members of the Pre-merger Notification Office, no one at either agency will then initiate contact with any of the parties or any third parties until the agencies decide which of them will be responsible for investigating the proposed transaction.

Once the investigating agency has clearance to proceed, it may ask any or all parties to the transaction to submit additional information. The request for additional information is generally referred to as a "second request." Parties that receive a second request and believe that it is broader than necessary are encouraged to discuss the possibility of narrowing the request with the staff attorneys.[40] The issuance of a second request extends the statutory waiting period until 20 days after the parties comply with the second request. The second request must be issued by the enforcement agency before the 30-day waiting period expires. If the waiting period expires and the agencies have not issued a second request to any party to the transaction, then the parties are free to consummate the transaction."

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[37] Neither agency can enforce a compulsory process or final order, for example, requiring divestiture of assets. Both agencies must seek the assistance of the Federal Court before a final order imposing a remedy can be enforced.

[38] Guide 1, *What is the Pre-merger Notification Program, An Overview.*

[39] Typically, clearance is sought when the agency has historical expertise and experience in a particular industry. For example, the FTC has historically dealt with mergers in the automobile, petroleum, retail grocery and cement industries. The DOJ usually looks at mergers in the steel and telecommunications industries.

[40] This process has recently been formalized whereby the agencies have publically committed to contact the parties within 5 days of issuing a second request to discuss its contents.

Review Process in the FTC

The number of filings reported to the FTC and the DOJ has more than tripled in the past 10 years, from 1,529 in 1991 to 4,926 in the year ending September 30, 2000. The fiscal year 2000 was expected to see an increase of 15 percent over the record set in 1998 (4,728).

More than 70 percent of merger filings are cleared on an early termination basis and less than 3 percent receive a second request. This represents approximately 100 second requests by the FTC in 1999 out of approximately 4700 filings. At the FTC, more than 60 percent of the second request investigations result in some form of enforcement action suggesting that the agency is careful when identifying those mergers where enforcement action is most likely. Parties fully comply to the initial scope of a second request in fewer than 15 percent of the cases. This is because the FTC works with the parties to reduce concerns and limit the documentation required.

More than two thirds of the FTC's competition enforcement resources are currently devoted to merger review. This is compared with the historical average of about 50 percent.

Pre-merger Notification

As noted above, the FTC administers the Hart-Scott-Rodino (HSR) process. Perhaps the most impressive aspect of this at the FTC is the unit headed by the Assistant Director, Pre-merger Notification Office (PNO), which first receives all of the HSR filings.

The Assistant Director, PNO regularly holds "brown bag" lunches with the "frequent filers" of the private bar in order to clarify, among others, filing issues and to explain changes in procedures. As of April 2000, 19 such lunches had taken place and several more were expected to be held at PNO regional offices. These lunches are very well attended by both members of the bar and of the PNO, who see them as a good vehicle for clarifying policy and procedures and improving communications and business relations between the two groups.

The PNO is staffed by several support persons, five attorneys and seven investigators. The support staff ensure that parties have properly completed the Pre-merger Notification Form and attached the fee. In addition, they enter all relevant information into a database, assign a PNO number to the case, date stamp and bind the documents. They also prepare a summary sheet and attach it to the file.

When a filing is deficient, the parties are called and asked to send in revised pages and a new certification of the Form. A deficient filing stops the waiting period until the corrected pages are received unless the missing information is considered to be trivial, in which case the PNO does not stop the clock and simply requests that the parties provide it as soon as possible. A filing is rarely found deficient. Counsel are very familiar with filing requirements, and the FTC and the DOJ regularly provide policy direction through speeches and papers.

Once initial verification has been done, the file is referred to one of the PNO attorneys or investigators for review. They complete a standard template, which describes the transaction, any issues and their recommendations. This information is entered into a database that is accessible on a read-only basis by the litigation attorneys as well as attorneys at the Department of Justice.

Parties generally provide sufficient information with the filing for PNO attorneys to determine whether or not to recommend early termination. The PNO does triage and decides which filings to send to the Bureau of Competition for further review. Even when there is no competition issue but the PNO is aware that a similar case has been addressed in the past, it usually forwards the file to the Bureau. The PNO generally has two or three days in which to make a decision to recommend either early termination or further review.

Given the 30-day legislative time frames, the PNO forwards all newly received transactions (with appropriate recommendations) to the Office of the Director, Bureau of Competition, by Wednesday of every week. The Director reviews the recommendations of the PNO (to either grant early termination or refer the case to the Bureau of Competition) and signs them off on Fridays. This is a very tight process that, with few exceptions, is strictly adhered to. This systematic process enables the PNO to effectively and efficiently deal with its caseload.

The Assistant Director of the PNO has made known her intent to streamline processes by capturing in the PNO database all information of an interpretative nature that is provided to private counsel. This will further ensure that the PNO provides consistent advice and information and that corporate knowledge is not lost with the departure of a PNO employee. With about 40,000 telephone calls to the PNO annually and staff turnover, it is critical that PNO staff provide consistent and accurate advice.

Clearance

The clearance process expeditiously resolves clearance issues between the FTC and the DOJ more than 95 percent of the time. The agency interested in pursuing the matter completes a Clearance Request that includes the pre-merger notification number, the parties, theory of the case, issues and agency expertise, along with the name of the attorney who is seeking clearance. There is a Clearance Office in each agency to direct this traffic. If no one argues with the clearance, then the case is assigned to the appropriate agency and person. When there is a dispute, the file goes to the Deputy Director of the Bureau of Competition and his or her counterpart at the DOJ. If the issue cannot be resolved at this level, the matter is further elevated until it is. The principal basis for clearance is expertise in the relevant product or products involved in the merger.

Review by the Bureau of Competition

Merger review in the Bureau of Competition is conducted by four operating divisions with 20 to 30 attorneys in each.[41] Of these, at least five or six are considered lead attorneys. FTC attorneys receive a great deal of their training on the job. Each of the four merger operating divisions has specific areas of expertise. For example, one division has expertise in defence and pharmaceuticals, while another specializes in chemicals and computers.

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[41] In addition, each merger operating division has five or six support staff members, including investigators and secretaries.

For a major file, after initial assessment by the PNO and during the initial 30 days, there might be a lead attorney, one or two junior attorneys and an economist. After the second request, additional staff may be assigned. For complex cases that are litigated, there can be as many as eight attorneys and two economists. There may be even more staff assigned to extremely complex cases that are litigated.

The merger operating divisions make extensive use of paralegals and the Bureau of Competition has about 30 on staff at any given time. The paralegals in the "paralegal program"[42] mainly help conduct interviews, review documents, draft memos and attend meetings. Each division also has two or three "career position" investigators who check compliance with second requests, prepare exhibits for trial books, draft motions and are responsible for document handling.

Depending on the volume of documents submitted in response to a second request, a lead attorney might request an additional 5 to 10 people to review the material. The lead attorney identifies the key issues and ensures that more seasoned staff read the most important papers, while the paralegals look at the less complex material.

The FTC typically hires an economic expert to provide testimony during litigation but does not generally hire industry experts.

Each division receives a package every week from the PNO with summaries (templates) that include such things as SIC code[43] overlaps and antitrust concerns. After reviewing this information, the divisions decide whether to request the HSR filing from the PNO for further review. According to officials, of approximately 4,600 filings in 1999, only about 1,000 were referred to the merger operating divisions. Of the cases sent to a division, a significant number (about 70 percent) are reviewed by an attorney who determines, based on the information in the filing, his or her knowledge of the industry and previous filings, and research of publicly available sources, that early termination should be granted without the need to contact third parties. Only about 100 of the cases result in the FTC issuing second requests.[44]

When a division determines that more extensive investigation is warranted, the FTC seeks clearance from the DOJ, which allows the FTC to contact the parties and third parties. Once an investigation is opened, it is entered into the Matter Management System and a second file number is issued.

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[42] Both the Department of Justice and the FTC have paralegal programmes in which undergraduates who intend to proceed to law school work for 14 months at the organization. The FTC has 30-35 in the programme at any time.

[43] 2-digit SIC codes are part of the system of Standard Industrial Classification established by the United States Government Classification Manual, 1987. Examples include 07 Agriculture Services, 13 Oil and gas.

[44] Of the 900 that did not result in a second request by the FTC, a certain number, after being cleared to DOJ would have resulted in second requests by the DOJ. DOJ issued 66 second requests in 1999.

Given the need to decide on and issue a second request within 30 days,[45] the merger operating divisions typically have less than three weeks from the time they receive the HSR filing to determine whether the competitive issues raised by the proposed transaction warrant such a step. Division attorneys must exercise extreme discipline, given their caseload and legislated time frames. Because of time constraints, they rely greatly on past experience and third-party contacts.

Once clearance is obtained, attorneys generally try to call customers and competitors to get information about the competitive conditions in the markets in question. They also contact the parties' counsel to request additional information about the companies and their products, competitors and customers. It is also not unusual for merger operating division attorneys to request, and for the parties to provide, recent ordinary course of business documents, such as strategic plans and competitive assessments, during the initial 30-day period.

Members of the bar are usually familiar with the areas of expertise within the Bureau of Competition and the DOJ. When a case will clearly be referred by the PNO, the parties' counsel usually provide a courtesy copy of the filing to the appropriate merger operating division attorney at the same time as they send it to the PNO. This gives the merger operating division attorneys time to become familiar with the filing while it is being processed in the PNO.

Parties often schedule meetings with merger operating division attorneys prior to or shortly after filing in order to identify the relevant competitive issues and provide additional information so the evaluation of the transaction can be completed within the initial 30-day waiting period. Regular contact between division attorneys and the parties typically continues throughout the initial waiting period.

The FTC allows parties to withdraw a filing and to re-file provided that they do so within 48 hours. There is no additional fee for this. The principle behind allowing re-filing is that in certain cases when competitive concerns have been identified, the parties may believe that the division attorneys, given additional time and information, may conclude that a second request is not necessary. In such instances, parties may decide to withdraw their filing and re-file, thus starting a new 30-day clock.

Merger operating division attorneys typically notify parties near the end of the initial waiting period whether or not they will recommend a second request. This may lead the parties to consider re-filing.

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[45] The 30-day initial waiting period, and 20-day period following substantial compliance with second request apply to the vast majority of transactions. However, there are shorter periods for cash offers and for filings where the acquiree is in bankruptcy.

Second Request

The Mergers Steering Committee must approve a recommendation by a merger operating division to issue a second request and a Commissioner must sign it. Merger Screening Committee meetings usually take place on Thursdays, but special meetings are often called when the file's 30-day waiting period is expected to end before a regularly scheduled meeting. The Mergers Screening Committee typically reviews one or two cases a week. An 8- to 15-page memorandum outlining the facts of the case and suggested relevant market definition, etc. is sent to members of the Mergers Screening Committee at least two days before the meeting.

The meetings are attended by the Director of the Bureau of Competition, the Deputy Director for Antitrust of the Bureau of Economics, the Assistant Director of the PNO and the merger operating division making the recommendation, Bureau of Competition and Bureau of Economics staff working on the matter and other interested FTC staff members. The purpose of these meetings is to discuss the transaction, potential relevant markets and key issues to be investigated. Sensitive issues that might arise in the investigation, international dimensions, the scope of the second request and potential remedies all may be discussed.

The Assistant Director for Operations conducts "a thorough review of all second requests before they are sent to the Commission in an effort to provide additional review of the scope of documents requested."[46] Once a second request is issued, its extent and requirements are typically negotiated by the parties with the attorneys in the merger operating divisions. If parties feel that compliance with portions of the information request should not be required, and they are unable to obtain a satisfactory outcome with the lead attorney and the Assistant Director of the merger operating division reviewing the case, they may petition the General Counsel of the FTC to hear an appeal of unresolved issues.[47] Discussions with officials of the FTC confirm, however, that appeals are rare, since the second request is, as a matter of course, negotiated with the parties.

In his remarks to the American Bar Association in April 2000, the then Director of the Bureau of Competition announced that the FTC will now "routinely schedule second request conferences early in the investigation in which key issues will be identified and, hopefully, an agreed upon plan for the investigation put in place. Staff attorneys are now instructed to convene a 'second request conference' with parties to a transaction within five business days after issuance of the second request, unless otherwise agreed.[48]" The FTC has also instituted a process whereby staff must respond to all requests for modifications within five business days after those modification proposals have been made.

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[46] Richard G. Parker. Presentation to the spring 2000 meeting of the American Bar Association, Spring Meeting 2000. April 7, 2000.

[47] Federal Trade Commission. *Requests for Additional Information : Appeal Procedure.*

[48] *Ibid 45.*

There is no deadline for complying with a second request. Once parties do comply and certify that they have done so, the agency is under tremendous time pressure because the parties can close their transaction 20 days after substantial compliance with the second request. Thus, to block a merger, the FTC must obtain a temporary restraining order or preliminary injunction from a Federal District Court before the 20-day period expires. However, the parties can agree to delay the closing of their transaction in order to give the agency additional time to review the matter.

Parties, knowing the process, usually do not file all second request information at once, but submit information as it becomes available in order to give the agency time to review the materials and fully assess the parties' arguments in support of the transaction.[49] The parties also usually meet with the merger operating division attorneys to make presentations and make their business officials available for investigational hearings.[50] The parties generally provide a written submission, called a white paper, that presents their arguments and supporting evidence. The parties may also choose to make a presentation to the Assistant Director of the merger operating division reviewing the transaction. In addition to the information submitted by the parties, the FTC relies heavily on interviews with third parties, including customers, competitors and other industry participants. The agency may also obtain third-party documents, information or testimony either voluntary or through compulsory process.

If the parties wish to make a presentation to the Director of the Bureau of Competition, they must do so at least one week before the waiting period expires. After a recommendation has been submitted to the Commission, parties generally meet with the Commissioners to try to convince them not to challenge a transaction. When the Commission believes that a merger would be anticompetitive, it has two primary options: enter into a settlement with the parties or seek to block the transaction through litigation. If the parties want to settle the matter, they negotiate a consent agreement with the FTC staff, on which the Commission must vote. If the Commission decides to block the merger through litigation, a majority of commissioners must vote to authorize staff to go before a district court to obtain a temporary restraining order and/or preliminary injunction. This halts the merger until a full review on the merits can be heard by an administrative law judge. When litigation is necessary, the FTC uses its own attorneys for the case.

Once a case is filed in District Court, the timing is within its discretion. For example, in the Staples-Office Depot case, the complaint was filed in November, there was a hearing in May and the decision came down in June. In a case involving drug wholesalers, the filing was in March and the decision came in late July. Some cases are decided much more quickly.

Closing Files

Attorneys complete a standard form at the end of every case, the contents of which is included in the database. The FTC annually tracks the number of cases with second requests that require remedies.[51] The FTC *Performance Report* and *Annual Report to Congress* contain additional statistical and case-related information.

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[49] The information the parties submit is required to be indexed.

[50] The FTC can also obtain testimony from the parties through the use of compulsory process.

The FTC's Office of Public Affairs prepares public announcements and other case-related documents for publication. The Office is staffed by communications experts, but the merger operating division reviewing a case, the Director of the Bureau of Competition and the FTC Chairman review all press releases to ensure legal and factual accuracy before they are released to the media. These announcements are also placed on the FTC's Internet site (http://www.ftc.gov).

The Director of the Competition Bureau meets with his assistant directors monthly and receives a weekly report of "hot topics." The Director's office is also in close contact with the mergers operating divisions to coordinate Mergers Screening Committee meetings, paper flow, and so forth.

Compliance Division

Staff from the Bureau of Competition's Compliance Division work with attorneys in the merger operating divisions, starting early in the process, to help develop potential remedies. This has the advantage of concentrating the agency's expertise in this area in one place. The division has six or seven attorneys. The Division also monitors compliance with orders and brings enforcement actions when parties violate HSR rules.

The Division was responsible for the recent FTC publication which assessed the success of divestiture orders.[52] This study looked at the characteristics of the orders and attempted to determine what made orders successful, for example, identifying an acceptable buyer up front. The Division works with the party's attorney to assess potential divestiture candidates, and identify and help retain trustees when required.

Bureau of Economics

Once a clearance is submitted, the Bureau of Economics is also notified of the transaction. However this Bureau is not expected to assign an economist to each file, since many are cleared after a few calls or research and require no significant economic input.

The Bureau of Economics comprises about 40 PhD-level economists and research assistants. Most economists have a caseload of one significant case and one or two others of lesser priority. The Bureau currently has only six research assistants. There are currently about one to two cases each week on which the economists must be assigned.

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[51] Federal Trade Commission, *Performance Report*, Fiscal Year 1999.

[52] *A Study of the Commission's Divestiture Process* is the first "systematic analysis of Commission divestitures since the passage of the Hart-Scott-Rodino pre-merger notification legislation in 1976. It looks at divestitures that were ordered between 1990 and 1994. Based on interviews, conducted in a case-study format, the report discusses factors that have made divestitures more and less successful, and concludes with recommendations for assuring more effective divestitures." Remarks of Richard G. Parker before the International Bar Association. Barcelona, Spain, September 28, 1999.

The economists have stated that 30 days do not provide a great deal of time to narrow a second request. Given that short time frame, they strongly believe that economists must be involved as early as possible in the process. They assist in the development of the theory of the case and the second request, assist with negotiations (considering whether potential remedies are acceptable) and usually identify the parameters for contracts. It is also critical that they participate in interviews, to ensure that the theory of the case is continually refined and supported and, when required, is modified.

Whether internal or external economists should be called to testify is an interesting question. While judges tend to see internal economists as biassed, the real question is whether they see someone hired to work on a case as any less biassed. Certainly, outside economists bring more "firepower,"so if the parties are using high-powered consultants the FTC can match them, an approach to cases the FTC favours. However, there is a concern that the pool of outside economists is shrinking, and reputable economists are extremely costly. It is also difficult to find experts who have a good balance of expertise in the industry in question and in industrial organization analysis. As a result, the Bureau of Economics is trying to promote using internal economists as witnesses and is training them to do so. Inside economists are less costly than their external counterparts, and benefit from in-house support. It is important to recognize that an in-house economist can be part of the team from the outset, providing guidance and leadership in case development and analysis, or can be brought in later to testify on specific issues, but cannot do both.

The Bureau of Economics also provides opportunities for their economists to devote up to 30 percent of their time on research. The Bureau generally tries to provide blocks of time when the economist is not assigned casework. This helps to maximize research time and provides a means of attracting new recruits.

Morale among the economists may be already affected when an internal economist is assigned to start a case but is subsequently replaced with external intellectual "fire power" when the case increases in importance and is headed for court. For this and other reasons discussed above, the Bureau of Economics goes to great lengths to motivate its staff and maintain a good pool of experts and experienced witnesses.

The FTC has created a two-day workshop on being an expert witness, and has set up mock trials so that economists can get testifying experience, understand the requirements and reality of a deposition hearing, and get a feel for witness requirements. It is also beneficial for litigators in the Merger operating division to practice being "on their feet", cross-examining witnesses and doing other courtroom activities.

The Bureau of Economics conducts seminars and workshops on how to prepare depositions, conducts simulations with outside economists and holds post-case assessments to evaluate, from an economic perspective, what worked well, and what models are or are not working. The Bureau also periodically includes new economists on cases with more experienced economists to help new recruits become familiar with the processes.

The FTC recognizes the value of looking forward, of attempting to anticipate change. The Bureau of Economics brings in academics and business people to brainstorm on emerging issues, and encourages staff members to debate new issues and propose new methodologies. The Bureau is committed to building expertise in important and emerging areas, such as econometrics and computer simulations of mergers.

International Cooperation

It is important, given globalization, to maintain cooperation with other agencies. While the legal profession is concerned because of the proliferation of merger control worldwide, the FTC is of the view that international cooperation is effective and efficient. In his remarks before the International Bar Association in Barcelona in September 1999, the former Senior Deputy Director of the Bureau of Competition, Federal Trade Commission, Richard G. Parker, noted that "agencies are up to the job and they are willing to work with one another to achieve complementary results. There is widespread convergence on market definition and on analysis of competitive effects. When, on extremely rare occasions, the agencies differ in outcomes, it is because of differences in the substantive standards in their respective laws[53]."

There is consensus among FTC personnel that the key development in recent years has been the waiver by merging firms of confidentiality requirements related to merger filings. This has enabled agencies to discuss matters openly and on the basis of a common set of facts. Agencies are able to identify markets in which they have concerns and discover if they share the same concerns. Technology has also improved cooperation. For example, e-mail is much faster and more efficient than phone calls and makes time zones virtually irrelevant. In general, greater and earlier cooperation has also enabled agencies to take a more coordinated approach to developing and obtaining remedies.

Another key ingredient has been the development and maintenance of an excellent working relationship between the FTC's International Division and the merger operating divisions, both of which need to stay abreast of developments in each other's area. The International Division is considered skilled in the strategies necessary to be effective in cases involving two or more jurisdictions. The merger operating divisions bring the case experience and recognize the value to a case of cooperating internationally (see Chapter 9 - for more information on international context).

Review Process at the Department of Justice

The DOJ's Antitrust Division has been faced with the same increased workload as the FTC. In her address to the Milton Handler Annual Antitrust Review of the Association of the Bar of the City of New York in November 1999, the Director of Operations and Merger

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[53] Richard G. Parker. *Global Merger Enforcement*. Before the International Bar Association, Barcelona, Spain. September 28, 1999.

Enforcement, Constance Robinson, noted that, "in fiscal year 1999, the DOJ and the FTC reviewed a record 4,679 transactions, an increase of nearly 65 percent since 1995. At the Division, we conducted 229 merger investigations, 66 of them resulting in the issuance of second requests. In this past fiscal year, we had 47 merger wins." Over the past two years, 97 transactions were abandoned or restructured in response to the competitive concerns expressed by the Antitrust Division.

As with the FTC, the Antitrust Division is under very tight deadlines to review files, having the same 30-day period within which to file or issue a second request, when required.

Pre-merger Notification

The Pre-merger Office (PO) of the Antitrust Division is small compared with that of the FTC. It receives and redirects filings to various litigation sections and is staffed with clerical support personnel, who do not do the same initial review function as the PNO attorneys at the FTC. All HSR filings are referred for decision to the litigation sections.

The PO logs the filing information into a tracking system. Based on the SIC, the PO determines the section to which the file should be assigned. Specific sections have expertise in electricity, telecommunications, regulated industries, transportation and computers, for example. It is the attorneys in these sections, and in some instances experienced paralegals, who conduct a first review.

The majority of files go to Litigation Section II, where they are referred to the HSR Coordinator. This attorney determines after a quick look whether the file can be terminated, which happens about 60 percent of the time. The Coordinator then notifies the PO by e-mail and a staff person there then enters the information in the database and prepares the necessary documentation. The Coordinator assigns the other 40 percent of cases, which are deemed to be more serious and complex, to litigators or experienced paralegals in the section. The majority of these files are granted early termination after an initial review by an attorney.

Review

The Antitrust Division has an elaborate system of macros (templates) that it uses to navigate through the process. These macros must be used for opening an investigation, requesting approval for second request, closing a file, etc. These macros[54], which are all routed electronically, lead users through a series of boxes that prompt them for information that is later required for reporting purposes, including the names of the parties and the size of the transaction.

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[54] The macro used for closing a file contains information on the volume of commerce and size of market, other quantitative data, the number of persons interviewed and whether there was compliance with the second request. In addition, it records the amount of information filed and whether compulsory process was used on third parties. The decision to accept the recommendation to close a no-interest file (about one to two pages) lies with the section chief but is usually taken by his or her assistant. The assistant is an experienced antitrust attorney who clarifies any outstanding points and raises any matters that are "close calls" with the chief or assistant chief.

When a filing is deemed worthy of investigation, a memorandum (PI) requesting clearance from the FTC is prepared and is approved by a section chief, and the Director of Operations and Merger Enforcement opens the investigation. The Antitrust Division attempts to obtain clearance for the majority of transactions within five days.

The Director of Operations and Merger Enforcement has weekly meetings with the Section Chiefs to review all cases and outstanding issues. Progress reports are prepared for these meetings and contain information about case names, second requests and pending files. A merger calendar is also prepared for these meetings, which lays out all the transactions and their due dates by month.

Second Request

When attorneys are seeking approval for a second request, they typically prepare a document called a Notebook, usually about 15 pages in length and based on the merger enforcement guidelines. The Notebook describes product markets and issues and provides enough detail so that the weekly meeting can progress beyond an elaborate description of markets and other aspects of the case. Rather, these meetings are used to challenge managers, who might be required to justify to their colleagues investigating a case that another might deem not worthwhile. Attorneys must be prepared at these meetings to describe the theory of the case, any holes in the theory, what the parties are saying and issues for which they are not prepared.

When a second request is issued, the DOJ is committed to meeting the parties to discuss and consider modifications within five days. The DOJ also has an appeals procedure to provide parties with the opportunity to narrow the second request when they do not agree with its contents. The Director approves second requests, but does not usually meet with or get involved in negotiations with the parties.

Under the law, the DOJ has 20 days to reach a decision after receiving the response to a second request. Parties are usually willing however to grant extra time if they can be assured of a specific time to discuss any remaining issues.

It is becoming increasingly common for parties to major transactions to withdraw their application and re-file to allow the DOJ time to complete its review. For example, parties might need to provide additional information in order for the DOJ to determine whether to terminate or to recommend a second request. There are also occasions when the agency has not completed market contacts and will be forced to recommend a second request if the assessment cannot be completed within the 30-day period.

DOJ Resources

The DOJ makes extensive use of paralegals, having 30 to 40 on staff at any given time. These staff review documents, set up interviews, take notes at interviews, do data entry and Internet research. They also prepare documents and affidavits for trial. Senior career paralegals often act as case managers for cases going to trial.

The DOJ employs about 50 economists. The Department has considered the appropriate use of both internal and external economists. In its view, it is better to have in-house economists working on files from the start, but to go outside for an economist to testify.

The Antitrust Division has a formal training program for merger review, managed by a training coordinator. The Division has also hired the National Institute of Development to help develop various training materials on subjects such as trial fundamentals and negotiation skills. Training focusses on practical skills, such as how to fill out a second request and how to negotiate. There are brown bag lunches, seminars and a video tape library. New recruits are also paired with experienced senior attorneys and work with various attorneys to benefit from their strengths.

The Director also encourages post-mortems and during these meetings asks employees two fundamental questions: What three things would you not do again? What three things would you do again? These questions provide focus and direction to the antitrust analysis and ensure a good balance of positive and constructive commentary.

International Cooperation

The Antitrust Division recognizes the importance of international cooperation in merger review. As noted in its *Annual Report* to Congress, "an increasing number of transactions have competitive implications in more than one country, and today it is not uncommon for a transaction to be subject to multicountry review.... We are working closely with governments around the world to cooperate in merger review, both to minimize burdens on private parties and to advance the cause of proper antitrust analysis. To advance this process, the Attorney General established the International Competition Policy Advisory Committee (ICPAC), which issued its report reviewing international antitrust issues and making recommendations for consideration[55]." (See Chapter 9 - Merger Review in an International Context for more information on ICPAC.)

It is clear that the Department places considerable importance on effective international cooperation and sees good relations and the ability to discuss common issues among agencies as vital. The ability to work together to identify issues and coordinate development of remedies has been cited as a clear benefit of such cooperation. For example, DOJ staff see the increasing use and acceptance of waivers of confidentiality as a significant development that helps effective review in a multi-jurisdiction cases.

The Antitrust Division has had success cooperating with other agencies, for example, in the WorldCom-MCI merger with the European Commission. This merger involved "two U.S. telecommunications firms, which resulted in the divestiture of MCI's US$1.75 billion in Internet assets — the largest divestiture in U.S. merger history. In that case, the parties provided written waivers of confidentiality that permitted the two agencies' staffs to work closely together in making their independent analyses of the transaction[56]."

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[55] Antitrust Division, Department of Justice. *Annual Report, Fiscal Year 1999*. March 20, 1999.

[56] *Ibid.*

Comments from the Private Bar

Some counsel noted that they do not, as a matter of course, contact agencies upon or before filing. They feel that calling an agency signals that there might be issues or complexities with a file. If a lawyer deems a file to be relatively simple, he or she does not contact the agencies. However, since from a lawyer's point of view it is important for antitrust agencies to narrow issues as quickly as possible, other lawyers welcomed the opportunity to discuss a case in advance of filing in order to narrow the scope of the filing requirement. According to some, the filing form does not provide adequate information with which agencies can adequately assess a transaction, although parties regularly include additional information with a filing. Others have said that the value of a two-stage process is that it allows agencies to quickly narrow files down to those that require intensive review.

In the view of some lawyers, the greatest strength of the Federal Trade Commission is the Pre-merger Notification Office — it is seen as one of the most responsive agencies in the U.S. government. It is seen as critical for the PNO to continue to be responsive and consistent. There is a danger, however, in being compelled to be responsive and provide quick service so that a transaction will not be delayed. If all employees in a notification unit do not have thorough knowledge and access to accurate and consistent information, there is a risk that they could provide false or inaccurate information. For this reason, it is critical that agencies capture in electronic form all advice and interpretations and make them available to all prenotification staff.

Canada

The lawyers interviewed who were familiar with the Canadian merger review system were complimentary, noting the Competition Bureau's excellent reputation for openness and extensive expertise.

When asked about the Bureau's merger filing system, some noted that having parties voluntarily filing a long form would, in their opinion, signal the Bureau that there are potential problems with the transaction. Some lawyers feel that there should be one form, along with the opportunity to file additional information and respond to requests for additional information.

Some also noted that requests under section 11 of the *Competition Act* seem to have brought added discipline to the Bureau. They are seen as having the advantage of getting senior Bureau officials involved in the process. The lawyers agreed that tying section 11 requests to identified issues would be beneficial, and recommended that the Bureau provide the opportunity for discussing requirements and ways to meet the demands of a section 11 request. In this regard, the lawyers noted positively that information produced for U.S. agencies is generally acceptable for their Canada counterparts.

The service standards the Competition Bureau has adopted were seen as positive, but some lawyers expressed concern about the "complex" category of cases and felt that the definitions should be reconsidered and refined.

Some echoed the findings of ICPAC and stressed the importance of an early narrowing of issues, and early and ongoing dialogue among agencies, which would ensure that two or more agencies are not focussing on separate issues.

Some lawyers also stressed the importance of waivers of confidentiality in order to facilitate the exchange of confidential information. This is seen as positive for parties as well as for the agencies involved, as long as the agencies provide assurance that confidential information will be safeguarded.

Another recommendation was for the Bureau to provide more press releases on major cases that are not challenged. The approach of the Australian Competition and Consumer Commission was cited as a good example.

Annex A: People Interviewed

Federal Trade Commission (FTC)

Name and Title	Address	Phone/Fax/E-mail
Marian R. Bruno Assistant Director Bureau of Competition Federal Trade Commission Pre-merger Notification Office	600 Pennsylvania Ave. N.W. Washington, D.C. 20580	Tel.: (202) 326-2846 Fax: (202) 326-2884 E-mail: mbruno@ftc.gov
Randolph W. Tritell Assistant Director International Antitrust Federal Trade Commission	600 Pennsylvania Ave. N.W. Room H-382 Washington, D.C. 20580	Tel.: (202) 326-3051 Fax: (202) 326-2884 E-mail: rtritell@ftc.gov
Kathy S. French Investigator Federal Trade Commission	600 Pennsylvania Ave. N.W. Washington, D.C. 20580	Tel.:(202) 326-2703 Fax: (202) 326-2012 E-mail: kfrench@ftc.gov
Claudia R. Higgins Assistant Director Bureau of Competition Federal Trade Commission	6th and Pennsylvania Ave. N.W. Washington, D.C. 20580	Tel.: (202) 326-2810 Fax: (202) 326-2884 E-mail: chiggins@ftc.gov
Michael R. Moiseyev Attorney Federal Trade Commission	601 Pennsylvania Ave. N.W. Washington, D.C. 20580	Tel.: (202) 326-3106 Fax: (202) 326-2655 E-mail: mmoiseyev@ftc.gov
Geoffrey D. Oliver Assistant to the Director Bureau of Competition Federal Trade Commission	600 Pennsylvania Ave. N.W. Washington, D.C. 20580	Tel.: (202) 326-2275 Fax: (202) 326-2884 E-mail: goliver@ftc.gov
John J. Parisi Counsel for European Community Affairs Bureau of Competition Federal Trade Commission	6th and Pennsylvania Ave. N.W. Washington, D.C. 20580	Tel.: (202) 326-2133 Fax: (202) 326-2884 E-mail: jparisi@ftc.gov
Christina Perez Attorney Federal Trade Commission	6th and Pennsylvania Ave. N.W. Washington, D.C. 20580	Tel.: (202) 326-2048 Fax: (202) 326-2655 E-mail: cperez@ftc.gov
Gregory Vistnes Deputy Director for Antitrust Bureau of Economics Federal Trade Commission	6th and Pennsylvania Ave. N.W. Washington, D.C. 20580	Tel.: (202) 326-2937 Fax: (202) 326-2884 E-mail: gvistnes@ftc.gov

Department of Justice (DOJ)

Name and Title	Address	Phone/Fax/E-mail
Constance K. Robinson Director of Operations and Merger Enforcement Antitrust Division Department of Justice	950 Pennsylvania Ave. N.W. Room 3117 Washington, D.C. 20530	Tel.: (202) 514-3544 Fax: (202) 514-1629
J. Robert Kramer II Chief, Litigation II Section Antitrust Division Department of Justice	1401 H. Street N.W. Suite 3000 Washington, D.C. 20530	Tel.: (202) 307-0924 Fax: (202) 307-6283

American Bar Association

Name and Firm	Address	Phone/Fax/E-mail
Ronald A. Bloch Counsel McDermott, Will & Emery	600–13th Street N.W. Washington, D.C. 20005-3096	Tel.: (202) 756-8012 Fax: (202) 756-8087 E-mail: rbloch@mwe.com
Terry Calvani Pillsbury Madison & Sutro LLP	1100 New York Avenue N.W. Ninth Floor, East Tower Washington, D.C. 20005-3918	Tel.: (202) 861-3053 Fax: (202) 822-0944 E-mail: tcalvani@pillsburywithrop.com
Rebecca S. Prince Practice Support Specialist McDermott, Will & Emery	600–13th Street N.W. Washington, D.C. 20005-3096	Tel.: (202) 756-8194 Fax: (202) 756-8087 E-mail: rprince@mwe.com
Christine C. Wilson Attorney at Law Collier, Shannon, Rill & Scott, PLLC	3050 K Street N.W. Washington, D.C. 20007	Tel.: (202) 342-8569 Fax: (202) 342-8451 E-mail: cwilson@colshan.com
Joseph F. Winterscheid Jones, Day, Reavis & Pogue	51 Louisiana Ave. N.W. Washington, D.C. 20001-2113	Tel.: (202) 879-3939 Fax: (202) 626-1700 E-mail: jwinters@jonesday.com

Annex B

The FTC and the DOJ Antitrust Division file a joint *Annual Report to Congress* at the end of each fiscal year. This report contains a wide variety of statistical information related to major cases, a sample of which appears below. The full report is accessible on the FTC website at (http://www.ftc.gov/) and the DOJ website at (http://www.usdoj.gov/).

Transactions by Fiscal Year

	1996	**1997**	**1998**
Transactions reported	3087	3702	4728
Investigations in which second requests were issued	99	122	125
FTC	36	45	46
DOJ	63	77	79
Transactions involving a request for early termination	2861	3363	4323

In addition to the above, the FTC and the DOJ track and report the following statistics:

- acquisitions by size of transaction;
- transactions involving the granting of clearance by agency and by range (US$ millions);
- investigations in which a second request was issued (by range and agency);
- acquisitions by reporting thresholds;
- transactions by assets of acquiring parties;
- transactions by sales of acquiring parties;
- transactions by assets of acquired entities;
- transactions by sales of acquired entities;
- industry group (SIC) of acquiring party.[57]

The FTC and the DOJ also file separate performance reports under the *Government Performance Results Act*. The information below is a sampling of the details contained in the FTC's 1999 report.

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[57] Two-digit SIC codes are part of the system of Standard Industrial Classification established in the *United States Government Classification Manual*, 1987. Examples: 07 Agriculture Services, 13 Oil and Gas.

Average number of days for review of HSR-reported transactions

Target	20
Actual	19

Average time, in months, from proposed consent orders to divestitures

Target	9
Actual	4

Merger Review in Australia

Chapter 6

Introduction

Mergers in Australia are subject to review under the *Trade Practices Act 1974* (TPA). The TPA is administered and enforced by the Australian Competition and Consumer Commission (ACCC), an independent statutory authority.

In addition to review by the ACCC, mergers can be the subject of private actions under the TPA, but only for damages, declaration or divestiture. Mergers involving foreign investors are also subject to the provisions of the *Foreign Acquisitions and Takeovers Act 1975*, which is administered by the Foreign Investment Review Board.

Judicial review of mergers arises only:

- when parties threaten to complete acquisitions despite ACCC opposition and are then forced to defend ACCC injunction proceedings in Federal Court;
- when formal authorization has been applied for and rejected by the ACCC. The decision can be reviewed by the Australian Competition Tribunal (ACT), which will conduct a full re-hearing on the merits. From the Tribunal, appeal to the Federal Court on points of law only are allowed.

Legislative Provisions

Mergers are governed by section 50 of the TPA, which prohibits acquisitions of shares or assets if the acquisition would have, or be likely to have, the effect, of substantially lessening competition in a market. For purposes of merger analysis, relevant product and geographic markets are defined in a manner consistent with the hypothetical monopolist paradigm used by the Bureau. However, for purposes of section 50 of the TPA, section 50(6) provides that market means "a substantial market for goods or services in Australia, in a State or in a Territory." This prevents the capture of *de minimus* transactions by the legislation. The legislation stipulates that in determining whether an acquisition will or is likely to lessen competition substantially the following matters must be taken into account:

- the actual and potential level of the import competition in the market;
- the height of barriers to entry to the market;
- the level of concentration in the market;
- the degree of countervailing power in the market;
- the likelihood that the acquisition would result in the acquirer being able to significantly and sustainably increase prices or profit margins;
- the extent to which substitutes are available in the market or likely be available in the market;
- the dynamic characteristics of the market, including growth, innovation and product differentiation;
- the likelihood that the acquisition would result in the removal from the market of a vigorous and effective competitor; and
- the nature and extent of vertical integration in the market.

All share acquisitions are potentially subject to analysis under the merger provision regardless of whether or not they result in control of the target firm.

There is no formal requirement for parties to a proposed merger to notify the ACCC, however, there is provision for parties to apply for authorization.

Authorization

The TPA allows a process whereby mergers that conflict with the substantive lessening of competition test can be allowed to proceed on the basis that they will create a net public benefit. This process is termed authorization. This a formal process requiring application to and public review by the full Commission. Various trade-offs can be considered under this process, including efficiencies, enhancement of international competitiveness, enhancement of exports, etc. Such trade-offs are considered on a case by case basis.

Structure

The ACCC is a statutory authority created for the purpose of administering and enforcing the TPA. Portfolio responsibility for the Commission rests with the Department of the Treasury. While the Commission has wide-ranging responsibilities under the TPA and other legislation, this chapter focusses on its role in merger review.

The ACCC comprises a Chairperson, a Deputy Chairperson and a number of full-time commissioners and part-time Associate Commissioners. In carrying out its role, the ACCC is assisted by staff, including a Chief Executive Officer and a General Manager responsible for mergers and asset sales. Currently, there are 20 to 23 staff devoted to merger review, which represents approximately six to seven percent of the Commission's total.

Process

Mergers are generally brought to the Commission's attention prior to their completion, either through informal procedures or through an application for authorization.

As an integral part of its merger enforcement approach, the ACCC encourages parties to approach it as soon as there is a real likelihood that a proposed merger will proceed. Parties can make this approach on either a confidential basis or on the basis that the proposed transaction is in the public domain. The ACCC is satisfied with this voluntary approach to pre-merger notification, and says that it has only rarely not been notified of a problematic transaction. Compliance with this voluntary approach is probably seen as sensible by the business and legal communities, at least in part, due to provision for pecuniary penalties against parties, including their directors, lawyers, banks and other advisers, if a merger occurs without notice and that the ACCC considers there to have been a breach of the TPA.

When a matter is considered on a confidential basis, the ACCC will not provide the parties with any definitive view until it has the opportunity to seek information from and the views of other parties, including industry participants, appropriate government authorities and, when relevant, competition agencies in other jurisdictions. On a confidential matter a response will be provided that indicates:

- the acquisition is considered to substantially lessen competition;
- the acquisition raises some concerns but will not be opposed prior to making market inquiries; or
- in the absence of market inquiries, the ACCC does not propose to express an opinion but does not intend to oppose the acquisition at that time.

Parties proposing mergers are encouraged to provide written submissions and background documentation describing the proposal and providing an analysis of the competitive impact of the merger. In cases where there appears likely to be a breach of the TPA, the ACCC will request relevant internal documents from the parties. If such documents are not provided voluntarily, the ACCC is prepared to use its formal powers provided under section 155 of the TPA.

The actual review process and factors taken into consideration by the ACCC in assessing mergers are substantially similar to those in Canada, but there are some significant differences in internal processes. These arise principally from its differing structure (i.e. it is a commission that incorporates both investigative and adjudicative functions).

In matters where parties wish that the matter to remain confidential, the Commission will generally provide its informal advice within two to three weeks. Where it is appropriate to make market contacts, the ACCC attempts to meet the following service standards:

- in matters that do not breach the merger thresholds, parties are informed within 10 to 15 days that the ACCC does not propose to take any action at that time;
- in matters which do appear to breach the thresholds, the ACCC will usually require approximately one month to make market inquiries and consider the matter; and
- in those few major cases that raise substantial issues and are likely to be subject to some form of enforcement action by the ACCC, it may take six to eight weeks to fully consider the matter.

(Note that these standards only apply from the point at which the parties have provided to ACCC staff all relevant information necessary to conduct the review of the proposed merger)

Approximately 65 percent of merger matters fall into the first category. These are straightforward, non-complex mergers that do not require extensive analytical work or market contacts before concluding that they raise no significant issues. For the second and third categories, analysis requires careful consideration under the Merger Guidelines and all these matters are considered (up to 1996) by the full Commission either in the first instance or after initial review by the Mergers Review Committee. Some delays can be encountered due to incomplete information being provided by the parties or obtaining information relating to offshore acquisitions.

In 1996, the ACCC streamlined its process for merger review. Only the most complex matters are now considered by the full Commission. The majority of matters are considered by the Mergers Review Committee, comprising the Chairman and nominated Commissioners, with the Committee's decision being reported to the ACCC. The Committee meets once a week to deal with proposals. Matters which raise concerns are referred to the full Commission for further consideration.

Remedial Measures

If the ACCC concludes that a proposed merger would, or would likely to have, the effect of substantially lessening competition, the parties will be advised of this view. At that point, the parties have the following options:

- abandon the proposal;
- modify the proposal to address the anti-competitive consequences, either informally or formally by way of enforceable undertakings;
- apply for authorization for a ruling by the ACCC that, notwithstanding the substantial lessening of competition, the merger should be allowed on the basis that it would result in a net public benefit;
- seek to complete the transaction at their own risk; or
- seek a declaration that the proposal does not contravene the TPA.

In cases where the ACCC concludes that a merger proposal will, or is likely to, lessen competition substantially, it has a number of possible responses. It may:

- seek an interim or a permanent injunction against the merger from the Federal Court;
- seek an informal undertaking or an undertaking pursuant to section 87B of the TPA from the parties not to proceed; or
- seek enforceable undertakings under section 87B that will resolve the competition concerns.

The ACCC does not normally consider it appropriate to allow a merger about which it has concerns to proceed and to seek remedies post-closing.

The availability of enforceable undertakings is an interesting facet of the Australian system of competition policy. Section 87B of the TPA allows the ACCC to accept written undertaking in the exercise of its power and for the enforcement of such undertakings in the Federal Court. Once undertakings are provided, parties can vary or withdraw them only with the consent of the ACCC.

The Commission considers undertakings to be an integral part of the enforcement scheme. The ACCC does not have the power to require undertakings; rather they can be raised as an option and it is left for the parties to offer them. Undertakings can only be accepted by the ACCC itself, not by the Commission staff. They must be of substance and address the conduct at issue. They will not be accepted if they include a denial of liability, statements that they are not an admission in relation to the conduct at issue, terms purporting to defend the conduct at issue, or obligations placed upon the ACCC.

There are a number of basic elements for undertakings, the include:

- a brief description of the parties and conduct at issue;
- the undertaking (i.e. the proposed action of the parties); and
- acknowledgement that the undertakings will be put on the public record.

In respect of mergers, undertakings are used:

- to ensure that an acquisition is not completed until the Commission has had the opportunity to make market inquiries; or
- to resolve matters where the proposed acquisition is, in the Commission's view, likely to contravene the TPA.

Structural solutions to merger issues are preferred and the Commission is not likely to favour behavioural undertakings. In almost all cases, the ACCC will want to consult with relevant market participants before accepting substantive undertakings in respect of a merger proposal. Following acceptance of undertakings, the Commission requires that its implementation and effectiveness be monitored.

Public Register

The ACCC maintains a public register of all the mergers it considers. Included in the register are brief details of the proposed merger, product descriptions and brief reasons for the Commission's response to the merger. Merger authorizations are also registered publicly.

Interviews with the Private Bar

Chapter 7

Senior Competition Bureau officials met throughout February to May of 2000 with approximately 45 lawyers in Toronto and Montreal who regularly deal with the Mergers Branch. The lawyers who were invited to participate in this exercise received a list of possible topics for discussion but were encouraged to raise other issues if they wished. Names of those who were interviewed are included as Annex A.

Most invitees also brought partners and associates from their firms to the interviews, which involved groups of two to nine people. Those interviewed included lawyers who have represented the Bureau as agents of the Crown, former Directors and officers, as well as those who have dealt with the Bureau from a strictly external perspective. When particular individuals were not available, their colleagues canvassed them for input in advance.

These interviews were intended to measure stakeholder satisfaction and perceptions stemming from their experience with the Branch. Questions were not fact-based. For example, counsel were not asked to indicate in how many cases the Bureau had either met or not met service standards. They were asked open-ended questions and were free to raise any and all issues related to merger review. The lawyers, in fact, did not limit their comments to their experience with the Branch. Rather, they took the time to offer suggestions for solving perceived problems.

Overview

Counsel expressed a great deal of frustration about the review process, in particular, that problems had developed or were developing and were threatening the reputation that the Branch and the Bureau had justifiably earned since 1987.

That said, all of those surveyed expressed their appreciation for the work of the Mergers Branch and the professionalism of its staff. They generally felt that staff are aware of closing dates and try to complete their analysis and respond in a timely manner. The lawyers applauded the dedication and expertise of Bureau staff, and their willingness to deal with cases as quickly as possible.

Many recognized that the Bureau had been under tremendous pressure because of increased filings as well as the increasing complexity of transactions. They noted that there are more multi-jurisdictional transactions now than in the past and that this trend is expected to continue. They also recognized that factors such as technology, deregulation, internationalization of markets and increased concentration in certain sectors are providing unprecedented challenges to the Bureau. They expressed concern that these factors, taken together, were overtaxing managers, that staff were showing signs of stress and that problems had either developed or were developing.

Most of those interviewed commented that the benchmarking study was very timely in view of the combined impact on the merger review process of an ever increasing number of mergers, of the complexities involved in the banking, airline, grocery and energy related industries, of service standards and the demand of the new regulations under the Act. Many applauded the Commissioner for this transparent, timely and important process. They saw this initiative as allowing the Mergers Branch to address certain important issues in the review process quickly in order to improve the effectiveness, efficiency and the overall health of the Branch.

A large number of those interviewed have dealt with the Branch for a long time. As a result, many of the lawyers framed their comments by comparing historical practice (prior to 1998) to more current approaches (1998-2000). Many of those interviewed felt that their concerns reflected behaviour that seemed to have emerged as a result of the new service standards regime; others felt that the unprecedented increase and complexity of files was overwhelming the Branch.

Almost without exception, the lawyers applauded the Bureau for its improved Web site and e-mail service. They found the backgrounders, guidelines related to mergers and prompt e-mails related to news releases very timely and informative. These initiatives were cited as examples of the value of providing more timely information and as an important step in making the Bureau and its work more transparent.

This chapter groups the comments received under a number of broad headings representing the critical aspects of an effective merger review process, and contains summaries of the lawyers' comments made during interviews, unattributed quotes as examples, and recommendations provided by those interviewed. The issues reviewed in this chapter represent those subjects upon which there was a broad consensus amongst those interviewed.

Prenotification Unit and Process

The Prenotification Unit (PNU) and its staff were very highly praised for their dedication, professionalism and service. They were commended for often going "above and beyond the call of duty." Without exception, all of the stakeholders commented very positively about the PNU.

Areas seen as critical to the success of the PNU include professionalism, knowledge, experience, ability to respond quickly, timely feedback (calls and receipt letters), consistency in approach and advice related to specific issues, confidence and low turnover of personnel. These, in turn, enable counsel to provide consistent and reliable guidance to their clients.

All of those interviewed see the PNU as one of the most critical functions in the Mergers Branch. They noted that it is crucial that this unit is effective, given the very high case volume, the urgency involved in merger review generally and the economic impact of delays.

One concern the lawyers raised was that files had been held in the PNU, rather than being assigned to an officer, when required information was missing. As a result, the review did not start until days later than it might otherwise. As a result, during the period until the filing was complete, counsel did not have the name of an officer with whom to discuss additional, non-statutory information requirements and delivery. The lawyers interviewed suggested that perhaps the review could begin upon receipt of the file, recognizing that neither the prenotification nor service standard clock would start until the information was complete. Such an approach would allow the company to begin assembling additional information while, at the same time, completing the requirements of prenotification. This could have a significant impact on the timing of the review, for example, when documentation might be in another country and could take days to identify and deliver.

There were also occasions when internal reviews had begun in other countries but not in Canada because the file was not considered to be complete. This was difficult to explain to clients who are kept abreast of developments in the other relevant jurisdictions.

Since these comments were made, the PNU has instituted a process whereby files are forwarded promptly and assigned to officers who are able to begin their review even before the file is complete. The PNU tracks these files and ensures that relevant material is obtained and forwarded to the appropriate officer.

There was also the suggestion that more than one Department of Justice lawyer be assigned to the PNU. While the current lawyer was applauded for his expertise and dedication, the lawyers were concerned that there was no formal back-up lawyer available to provide advice to the unit in the current lawyer's absence. There was also concern that one lawyer might not be enough to handle the work stemming from the amended regulations.

Mergers Branch and the Competition Law Division, Justice Canada recently identified a back-up lawyer for the PNU.

Many suggested that the PNU should be given more prominence by increasing the number of staff and establishing a manager or senior officer position. This manager or senior officer would oversee the Unit's work, and should be part of the Merger Branch management team to lend weight, consistency and importance to issues raised at the filing stage. Counsel noted that this senior person should be experienced, decisive and respected. These comments reflect concerns that timing is critical at the front end of the merger review process. This issue is further defined below in the section entitled "Timeliness and Initial Triage."

Mergers Branch has, as of October 30, 2000, instituted the Merger Notification Unit (MNU) which is headed by a senior officer, comprised of several officers and is responsible for filings, ARC requests, complexity ratings and the review of the majority of non-complex files.

There were also suggestions that the Branch, and the MNU in particular, should make greater use of technology to improve efficiency. For example, a number of those interviewed suggested that the Bureau should create an electronic database that would contain all the advice, guidelines and rulings it provides to counsel. To ensure that staff consistently provide the same information to all parties and their lawyers when new issues are raised and resolved, the information must be shared quickly with all staff. This is of particular importance to the MNU, which now also provides interpretations of the new regulations and forms. Counsel also suggested that it would be very useful and a timesaver for the Branch if this information could be put on the Bureau Web site in generic form.

It was generally agreed that having more resources available for the front end of the merger review process and increased use of technology will contribute to long-term savings both for the Bureau and merging parties.

Timeliness and Initial Triage

It is clear that a very critical part of the merger review process is identifying, as quickly as possible, those files with which the Bureau has no or relatively minor concerns. The timeliness with which staff assess these files is important. Counsel expect that the Bureau should be able to provide a response on these files within 14 days. Identifying these files quickly would, by extension, allow the Branch to focus resources more quickly on those files that do raise significant issues. The issue of timeliness is one of the most important to stakeholders. In their view, improving the timeliness of the front end of the process would improve turnaround times for all files, regardless of complexity.

A consistent point raised by interviewees, once the file is through the MNU, it should quickly be reviewed by a seasoned senior officer and sent for immediate processing and completion when it is not a complex matter. A typical comment was that "an experienced officer can take an initial look and know within 10 minutes whether there are issues."

It was suggested that relatively simple cases (e.g. non-complex and those at the lower end of complex) could be dealt with by less experienced officers and students under the supervision of a senior officer.

Training and experience among staff at the front end of the process are also critical. The lawyers noted that there seemed to be more instances in the 1998-2000 period of case officers who lacked experience, training, coaching, confidence and access to senior officers for advice. There was a sense that, as a result, these officers were following some kind of "checklist" and attempting to obtain all the information that could be required before completing their assessment. The perception among lawyers was that these officers were required to demonstrate that they had followed an established process. The lawyers frequently referred to instances when they were asked for information on files that, in their view, seasoned officers would have recognized as "no-issue cases."

Many lawyers noted that officers responsible for files were, in some instances in the past, summer students or term employees. This was disconcerting to parties and their lawyers, who expect to deal with officers who have experience and will see the case through to the end.

It was mentioned that, in law firms, experienced lawyers do some form of "triage" and assign only simple matters to new lawyers. These new lawyers do not initially deal directly and autonomously with clients. The risk of new lawyers providing "bad advice" to a client or requesting unnecessary information can have serious repercussions. Because of the intricacies of merger review, firms use the period before new lawyers work directly with clients for training and coaching.

The impact of inexperience in the early stages of the merger review process was seen to have a number of adverse consequences. For example, if an inexperienced officer thought that he or she might need two to four weeks to review a file, the case might be classified as complex, regardless of the complexity of the issues. While an internal statistical analysis does not confirm a trend to "overclassify" cases, lawyers' perception was that this was starting to happen.

With a central unit responsible for classification and review of non-complex files, 80 to 90 percent of files would be dealt with quickly, leaving the more complex cases for more detailed review. Inexperienced officers would not be required to make "the early call," and the number of requests for unnecessary information would be reduced. Such a unit would also enable the two existing divisions and assistant deputy commissioners to focus on the more substantial cases and other management issues.

Again, as a solution, many suggested setting up a dedicated unit, perhaps merging it with the MNU, under the leadership of a senior seasoned member of the staff. Counsel felt that this change would greatly enhance efficiency and the Branch's ability to focus resources on key cases.

As noted previously, the MNU is now responsible for classifying transactions and dealing with most non-complex files.

File Review

Accessibility

Counsel were very clear on the importance of having an open dialogue with the Branch early in the review process on files that would likely raise competition concerns, "to discuss issues before they become problematic." On such cases, it is particularly important for counsel to have access to Branch managers, to be able to quickly narrow the issues, to discuss any additional information requirements ahead of time and to raise concerns related to the process.

Counsel who have dealt with the Bureau over an extended period of time say that, in past years, they could telephone a Branch manager (usually a chief or assistant deputy commissioner) to discuss what might be an "issue" on a file soon to be submitted for a prenotification or advance ruling certificate request. They valued the trust that had been developed over the years and knew that they would be provided with the manager's "best guess" and reaction to the issue at hand, which would help them develop their submission. They were also confident that the Branch would give the submission prompt attention — that is, the Branch and managers would be expecting it and this early awareness would help focus the early stages of the review and ensure management's interest in the file.

Counsel were consistently of the view during these interviews that Branch managers and senior officers were not as accessible as they were in the past. In addition, telephone calls were not always returned or returned promptly; and files that were discussed with senior officers or managers were no further ahead in terms of review when the Branch received them.

A number of lawyers mentioned the confidential guidance and informal advice procedures in the U.K. Office of Fair Trading and the discussions prior to filing the Form CO in the EU as, respectively, examples of the value of early contact with the agency and a way to narrow the issues both for filing and for the review.

The general consensus was that this lack of availability was due to the heavy and ongoing workload on the assistant deputy commissioners. Most noted that some reorganization, which would reduce the number of files and issues for which each is responsible, should be considered. Again, lawyers referred to an expanded prenotification unit as a possible solution.

Counsel voiced similar concerns about accessibility after they had filed. The consistent view was that it was more difficult than in the past to find out, in a timely manner, who the officer was on any given file and the status of the review. The lawyers suggested that the Bureau send an e-mail, not yet another letter, with the name and telephone number of the case officer so that counsel can establish an early dialogue with the officer.

The Branch, as a standard practice, now includes the name and telephone number of the officer when confirming the service standard of the file. This confirmation is sent electronically.

There were also concerns about accessibility during summer holidays, March break and other holiday periods. Counsel recognized that the Bureau needs to provide holiday time to its staff, but noted that "business does not stop because someone in the Bureau is on holidays." Suggestions were made that a more focussed approach to holiday approval might be considered. Another suggestion was that officers planning holidays could "pick up the phone and say, 'Hi, my name is John Smith, I am the officer on your file. I will be away from the office until X but if you need information, please contact, Jane Doe.'" This would reassure lawyers and their clients that their file is not in a "holding pattern."

Another accessibility issue related to the telephone system. Some complained about the voice mail system and the lack of management of same. They noted that in certain instances, officers might be away from the office for days but did not indicate this on their voice mail message.

Consistency and Predictability

A recurring theme among those interviewed was that there was less consistency and predictability in their dealings with the Branch than previously. Consistency was described as lacking in two ways.

First is consistency of approach among officers, in the way files are approached, the nature and scope of responses to information requests and the guidance provided to counsel. A significant number of those interviewed felt that an officer's view of a case often depended on the officer in question. Depending on personality, experience, confidence and knowledge of industry, two officers could require from counsel greater or lesser information. Counsel saw this, in part, as resulting from a lack of internal information sharing and accessibility to seasoned officers and internal experts.

There was also a sense of a lack of consistency between officers and managers. There were accounts of lawyers receiving the case officer's view of the issues or the likely outcome on a file only to receive a completely different assessment weeks later when, the assumption is, a senior officer or manager became involved in the file. This is complicated for counsel, who must explain the change and, in some instances, the new and very voluminous information requirements to their clients. Instances were cited where lawyers had been given the impression that the file was progressing well only to be surprised by a detailed information request.

There was concern that lawyers have no mechanism by which to lodge formal or informal complaints related to developments in files and the manner in which officers are addressing issues. The U.S. Federal Trade Commission, reacting to similar concerns, has recently formalized a procedure to allow such matters to be raised with the General Counsel.[58] Refer to Chapter 5 - Merger Review in the U.S. for additional details.

Another result of a perceived inconsistency was that, according to counsel, many did not request as many advance ruling certificates as they have in the past. This appears to be a result of the perception that these now took longer to process, "the threshold for getting a certificate has gone up," and "officers are inconsistent in determining whether a certificate can be issued". In view of the perceived climate of greater uncertainty in the Bureau in the last couple of years, clients are more insistent that counsel stay within legislated requirements and time periods. "Clients want the assurance that comes with the waiting periods and prenotification."

As indicated in Table 1, the number of Advance Ruling Certificates (ARC) requests as a percentage of total merger reviews has remained fairly consistent over the last six-year period.

Table 1. Caseload*

This table includes all the commenced transactions that Mergers worked on in a fiscal year.

	Number of Transactions											
	2000-2001		1999-2000		1998-1999		1997-1998		1996-1997		1995-1996	
Business Line	#	(%)	#	(%)	#	(%)	#	(%)	#	(%)	#	(%)
PMN Filing	73	(20)	92	(22)	109	(30)	84	(21)	58	(19)	57	(25)
ARC Request	255	(68)	209	(49)	174	(48)	219	(56)	181	(58)	117	(52)
Other Examinations	45	(12)	60	(14)	26	(7)	17	(4)	23	(7)	17	(7)
Sub-Total	373	(100)	361	(85)	309	(85)	320	(81)	262	(84)	191	(84)
Securitizations	0	n/a	64	(15)	52	(15)	72	(19)	52	(16)	36	(16)
Total	373	(100)	425	(100)	361	(100)	392	(100)	314	(100)	227	(100)

*Includes all transactions received by the Branch from April 1 to March 31

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[58] Federal Trade Commission, *Requests for Additional Information: Appeal Procedure*.

Openness and Transparency

There was widespread view during the interviews that the Branch had become less open and transparent in recent years, in areas such as early identification of issues, willingness to discuss and debate issues, ability of lawyers to get a "progress report" and to negotiate the content of information requests.

There was a general view that in an increasing number of cases lawyers were not informed of emerging issues in a timely manner but rather were advised weeks into the process of issues to address.

On the specific issue of section 11 or other substantial information requests, counsel consistently stated that the Branch should, at the time it issues an information request, provide a clear statement to lawyers of the competition issues and concerns that are outstanding as the review moves to what can be described as the "second stage." Counsel felt that, by the time the information or section 11 request is issued, the issues should have been sufficiently narrowed, the Bureau should be focussed on the outstanding issues, and the context for the request could and should be conveyed to counsel.

The view is also that there should be a clear commitment from the Bureau to discuss the content of the request. Counsel proposed that the Bureau should contact them to discuss what information is being sought, whether the information sought could be provided in a different format than that proposed — one that is easier for the company to provide and still meets the Bureau's needs.

References were made to the U.S. approach where, when a second request is issued, the DOJ is committed to meeting the parties to discuss and consider modifications within five days. The DOJ also has an appeals procedure to provide parties with the opportunity to narrow the second request when they do not agree with its contents. The Director approves second requests, but does not usually meet with or get involved in negotiations with the parties.

In response to concerns that have been raised concerning the use of section 11 orders by the Bureau, an internal challenge function has been implemented. All section 11 applications must now be reviewed and signed off by a senior officer in the Compliance and Coordination Directorate. The objective is to ensure that the information requested focuses on relevant issues and that parties will be subject to the minimum burden necessary to meet the Bureau's information needs.

Merger Enforcement Guidelines

A frequently heard concern was that recent Bureau decisions, the current approach of Mergers Branch staff to merger review and the questions and the depth of some reviews suggested that the Bureau was no longer strictly adhering to the competition-based framework laid out in the Merger Enforcement Guidelines (MEGs).

This concern was expressed in two forms. First, the Bureau seemed, particularly in its public statements, to be placing a greater emphasis on quantitative issues at the expense of qualitative factors. Counsel saw this, potentially, as a move away from the MEGs and the intent of the law. A number of counsel gave the impression, in recent cases, that the Bureau would expect divestiture when market shares are more than 45 percent, without due regard for the impact of qualitative factors.

Cited in support of this view were the Bureau's public statements explaining decisions in the cases involving banks and grocery stores, and counsel's submissions to the Competition Tribunal in the propane case. In the grocery case for example, lawyers felt that the Bureau described its analysis and findings in terms of market share, devoting very few lines to the consideration of qualitative factors and offering no discussion of the method used and their relative importance. Many spoke of the "red, yellow, green" classification of markets as giving the perception of a market-share-driven analysis. An additional question, in light of the Bureau's statements, was whether the Bureau would expect divestiture in markets with more than 45 percent market shares regardless of the qualitative factors.

Counsel expressed an additional concern that, as the Bureau had become much more visible in the media and government, the environment in which it was operating had changed, presenting new challenges. They recognized that this had brought an additional burden and dimension to the merger review process.

Administrative Processes

There was a widely held view among lawyers that, since the inception of fees and service standards, the Mergers Branch had become much more process-oriented. The lawyers' concern was not with the fee but rather with the impact of the service standards, complexity definitions and guidelines[59] developed and introduced in 1997 in conjunction with the fees.

Counsel noted instances when they had lengthy debates with Bureau staff about whether a file was deemed to be non-complex, complex or very complex. The time and expense of these conversations detract from the substantive issues and delay closures.

Fees

There were no negative comments about the fees, which are small compared to the total expense involved in a typical merger. The lawyers do, however, expect the process to benefit since the Bureau now receives additional funding through revenue.

Service Standards

A consistent view among the lawyers was that service standards cause greater concern than comfort. A lawyer's priority is the time required to obtain a decision on a particular case and to provide the Branch with the information it needs in order to make a decision as quickly as possible; closing dates are the driver for lawyers and their clients. Delays in obtaining a response from the Bureau can have very serious economic repercussions for the parties.

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[59] Competition Bureau. *Fee and Service Standards Handbook pursuant to the* Competition Act. Release 2. May 1, 1998.

Counsel noted that the Bureau no longer systematically sent a letter confirming the service standard. In the first year or so following the implementation of the fee and service standards process, the Bureau sent the letters "...within five business days of receipt of the filing or request."[60] Some lawyers noted that they had not seen one of these letters in six months to a year.

While regretting the fact that the letters are not systematically sent, counsel were generally of the view that these service standard letters are a source of confusion and worry for merging parties. Many lawyers stated that they no longer ask for these letters for fear that weeks or months into the process, they will receive a letter indicating the administrative service standard period. "If an officer has told me that it will take three to four weeks to come to a decision, I don't want a letter telling my client that it's complex and could take up to ten weeks to review." A further complication that was noted is that because the response is a template that includes the time period but not the specific dates related to service standards, it is often assumed that the service standard period begins when the letter is received which, in some cases, might be a considerable time after filing.

The MNU has updated the letter[61] *to include the beginning and end of the service standard period (Annex B).*

Compounding the problem, in the lawyers' views, is the difficulty in explaining to merging parties (particularly those outside Canada) the difference between legislated waiting periods and administrative service standards. Again, merging parties are concerned with legal requirements of the merger review process and the economic impact of delays in starting or finishing a review. In this context, service standards are "irrelevant."

An additional concern that was expressed is that human nature might lead officers to view service standards as deadlines rather than outside time limits. In such a situation, lawyers were increasingly concerned that the incentive to complete a review is lessened once a matter is classified as complex and the next internal date of significance is 10 weeks away. In light of these comments, the authors examined recent experience in the Branch. Annex C would indicate that this is in fact not happening, given the distribution of cases to completion time.

It should be noted that the authors of the ICPAC report (see Chapter 9 - Merger Review in an International Context) did share this concern, although they were generally in favour of service standards as a discipline on reviews. "There was also concern that maximum time periods would effectively turn into minimum standard review periods."[62]

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[60] Competition Bureau. *Fee and Service Standards Handbook pursuant to the* Competition Act. Release 2. May 1, 1998. Page 3.

[61] As of Fall 2000, the MNU responds by email rather than sending a letter.

A further issue that counsel felt needed to be clarified is when the "clock" starts on the review process. Counsel questioned whether it was appropriate to start only when *all* required information was received, since it is likely that the review could be started before that, while the company is compiling the additional information. Several lawyers referred to the practice in the U.K. Office of Fair Trading to start the clock upon receipt of a "reasonable submission."

Complexity Definitions

There was near unanimity among the lawyers that complexity definitions do *not* provide any kind of yardstick or comfort level for counsel to use when advising their clients. The categories, particularly the complex category, are seen as too broad. That and their view of a greater inconsistency of interpretation in the past have led lawyers often to ignore them altogether.

The guidelines in the *Fee and Service Standards Handbook* do not necessarily provide sufficient clarity to enable counsel to advise clients as to how a file will be classified. Counsel do not feel able to provide definitive advice to clients, based on the guidelines, regarding timing or the filing of information.

This was linked to a perception that Branch officers were classifying many more transactions as complex or very complex than they were in the past. While counsel recognize that there continues to be an increase in complex merger filings, they still had the impression that officers were being very conservative in assigning complexity levels to files.

Some lawyers noted that cases had been re-classified either from non-complex to complex or from complex to very complex. There was growing concern that files would be "bumped" to a higher category.

A *verification of statistics over the last four years indicates that complexity ratings as a percentage of totals has remained relatively constant (refer to Table 2). Nonetheless, it is expected that centralizing the classification of files within the MNU will ensure consistency and reduce the risk of unnecessary bumping. There may be circumstances however, when issues might arise late in the review, that might warrant a re-classification. This would be on an exceptional basis.*

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[62] *International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General for Antitrust*. Final Report. 2000. Page 133.

Table 2. Number/Percentage of Cases by Level of Complexity Excluding Securitizations*
This table includes all the transactions that have been completed by the end of the fiscal year (may include transactions that did not commence the same year)

	Number of Transactions							
	2000-2001		1999-2000		1998-1999		1997-1998[63]	
Complexity	#	(%)	#	(%)	#	(%)	#	(%)
Non-complex	282	(81)	232	(80)	212	(77)	68	(89)
Complex	53	(15)	49	(17)	56	(20)	8	(11)
Very-complex	14	(4)	8	(3)	6	(2)	0	n/a
Total	349	(100)	289	(100)	274	(100)	76	(100)

*Includes all completed transactions from April 1 to March 31 except 97/98, see footnote 63.

Most lawyers said that five days is not long enough, in many instances, for the Bureau to determine whether a file is complex or very complex, given the current definitions of complexity. Merging parties and their lawyers would have more confidence in the "system" if the Bureau took more time to assess the issues before determining that a case falls in the complex or very complex category.

Many noted that they would not be troubled if the Bureau eliminated the complexity definitions and service standards. With respect to the definitions, the clear concern was that the complex category is too broad, and counsel would like the Bureau to review the divide between the non-complex and complex categories. Suggestions ranged from expanding the non-complex category, perhaps also adding seven days to the review period, to adding a fourth category.

The lawyers noted that the reality is that the Bureau will get as much time as it requires; it is very rare for lawyers to advise their clients to finalize a merger prior to receiving the go-ahead from the Bureau. As a result, a frequently heard suggestion by counsel is that the Bureau use *internal* performance standards to provide guidance, internal discipline and training rather than the current published service standards.

Issues Related to Recent Amendments

New Short and Long Forms

Counsel were, for the most part, satisfied with the new short form and revised waiting periods under the *Competition Act*. The short form, in particular, was seen as a great improvement. It is straightforward, easy to comply with and not too costly in terms of time and money for parties to complete. The information requested on the form is similar to that required in other jurisdictions. Some lawyers, however, noted that in some instances the information required may not, at times, be available. In such instances, counsel want a dialogue with the officer assigned to the file to discuss filing requirements.

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[63] Represents only those files completed between November 3, 1997 and March 31, 1998.

Some lawyers felt that having to list 20 clients or customers on the form was unreasonable, and that listing 5 to 10 customers, including the top 2 to 4 would be better, particularly in non-complex cases when companies have low market shares and no overlap. It was felt that the Bureau could ask for additional information, where required, through a formal information request.

Counsel had serious issues both with the content of and policy related to the long form. Most noted that a clear statement from the Bureau on when the long form would be required is essential. Currently, the statements are seen as very qualified and open to interpretation.

One specific concern was that when a file is classified as complex or very complex, according to the service standards guidelines and procedures guide[64], the Bureau may request a long form. "The levels of complexity defined in the *Fee and Service Standards Handbook* provide some guidance as to the circumstances in which a long-form submission is more likely to be requested..... At the other end of the spectrum, parties to 'very complex' transactions should expect that a long-form submission will be requested if it is not submitted along with the section 114 notice. For proposed transactions in the 'complex' category... generally as the level of complexity increases and a detailed review is believed necessary, it is more likely that a long form submission will be required." This, according to counsel, is inappropriate in view of the fact that the definition for the complex category is so broad. Counsel are looking for greater clarity about where the Bureau "draws the line" at the higher end of the complex category for requiring a long-form filing. The lawyers point to the many qualified phrases in the current version of the procedures guide which add to the uncertainty. Given the amount of time counsel report it takes to comply with a long-form request, many lawyers requested a clearer statement from the Bureau.

There was also the perception that the Bureau would require more long forms than it had in the past, given the statement in the procedures guide "it is expected that instead of requesting a detailed list of additional information, the Bureau may ask the parties to provide the long-form information." and that "whether a long form submission will be requested for a 'complex' proposed transaction will depend on the supplemental information provided by the parties along with the short form submission, the quality of information obtained from other sources and the preliminary assessment of the section 93 factors." This contrasts with other statements in the guide that "if parties to a proposed transaction file a short form and supplement it with sufficient additional information, the long form might not be necessary." Given these statements, counsel would like the Bureau to look at the text of the guide again and provide greater certainty.

Some suggested the long form only be required when parties are not cooperating, are withholding information or seem to be causing unnecessary delays. The lawyer's preference, and indeed that of their clients, is to file a short form with additional pertinent information and a detailed review of the substantive issues. Parties would follow up with any additional information the Bureau requires. Counsel think this approach would be less costly for clients and the Bureau and more in keeping with international practice.

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[64] *Notifiable Transactions and Advance Ruling Certificates under the Competition Act: Procedures Guide*. Competition Bureau, May 2000.

Counsel with considerable experience in dealing with the Bureau expressed the view that in the past, they had only ever filed one or two long forms, if any. Some had never filed a long form. By contrast, several noted that, since the implementation of the new regulations, they have been required to file long forms.

A verification of the number of long forms received as of the end of March 2001 indicates that long forms were received in relation to 5 transactions in 1999-2000 and long forms were received in relation to 7 transactions in 2000-2001.

A number of those interviewed expressed a concern about using section 116 to justify not providing information because of the risk of falling afoul of section 116(3)[65] with all the attendant time delays that would encompass.

Information

Several lawyers expressed the hope that, with the 1999 amendments, the Bureau would see the value in terms of transparency and guidance, and of issuing interpretation bulletins on substantive issues.

Since the 1999 amendments, the Bureau has published the following guidelines:

- Section 108 - Definition of "operating business"
- Section 114 - Number of Notices - Multiple Step or Continuous Transactions
- Paragraph 111(a) - Exemptions for Ordinary Course of Business Acquisitions (draft)
- Section 112 - Exemption for Combinations that are Joint Ventures
- Subsection 110(3) - Acquisitions of Non-Voting Shares and Convertible Securities
- Subsection 110(4) - Amalgamation
- Paragraph 111(d) - Creditor Acquisitions
- Section 103 - "Substantially Completed" and Section 119 - "Completed"
- Shareholder Agreements
- Notifiable Transactions Regulations - Transactions and Events in Section 14
- Corporate Spin-Offs

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[65] s.116(3) Where a person chooses not to supply the Commissioner with information required under s.114 and so informs the Commissioner in accordance with subsection (2) or (2.1) and the Commissioner or a person authorized by the Commissioner notifies that person, within seven days after the Commissioner is so informed, that the information is required, the person shall supply the Commissioner with the information.

Many also suggested that, given the limited number of cases that go to the Competition Tribunal, the Bureau should increase its use of backgrounders and news releases on significant cases when it decides not to challenge a proposed transaction.

Training

There was a consistent view among lawyers that many of the issues and concerns being raised in the interviews were the result of a lack of a well-thought-out training and development program within the Branch. Counsel saw the uncertainty reflected in obtaining feedback from the Bureau as fundamental indications that there is a need to develop a targeted training program for staff involved in merger review.

One component of a comprehensive training program would involve mentoring and development of new officers. As indicated above, in law firms, experienced lawyers do some form of "triage" and only simple matters are assigned to new lawyers. These new lawyers do not, however, deal directly and autonomously with clients for up to a year. Along the same vein, the lawyers interviewed suggested that new officers should "shadow" experienced officers for up to a year. They could be assigned for three months at a time to officers who have known expertise and qualities, such as analytical skills, writing skills and interpersonal skills for market contacts and interviews. The new officer should also be required to work in the MNU to obtain a complete understanding of filing requirements.

Counsel also expressed a concern that perhaps Bureau staff have not been given the training to fully understand the environment within which a merger proposal takes place. For example, some felt that staff did not understand the mechanics of a public bid and the impact of a protracted merger review on stock prices and market participants. To address this issue, lawyers suggested that an important component of the Bureau's training would provide information on mergers in the broader context. For instance, it is important to recognize that the review is not taking place in a vacuum, and that with public bids, shareholders, traders, analysts, "Bay Street"and the media are watching and waiting for the Bureau's decision. Share prices can fluctuate based on perceptions that are generated during the period leading up to a decision.

These multiple market participants do not necessarily understand the Bureau's workings and requirements. For them, any delays can be perceived as serious concerns about the merger and have serious economic repercussions: "head hunters pick up key people," "Bay Street creates stories," "the world is watching," and "lenders get nervous."

It was suggested that representatives of other bodies such as the Ontario Securities Commission and Toronto Stock Exchange could be invited to provide seminars as part of a regular training program for Merger Branch officers. The Economic and International Affairs Branch could also provide regular economic seminars, including reviews of important cases.

Some also suggested that the Bureau make a regular practice of recruiting officers from other jurisdictions to learn from their processes.

As a final comment on the importance of a focussed training and mentoring program, there was general agreement among counsel that it takes a long time to become experienced in merger review. This "experience, and the confidence that go with it cannot be replicated overnight."

Technology

The consensus amongst those interviewed was that the Bureau should make much greater use of technology in addition to the creation of a database for the MNU as indicated previously. In their view, the Bureau should have a database with the names of officers and their relevant expertise. This database should also include information on relevant industry experts with summaries of the expertise and recommendations, details of persons interviewed with notes about their areas of knowledge and expertise, officer assessments of cases, and the like. Officers could use this database to quickly identify persons who might have knowledge relevant to a particular file, for instance, and who in the Branch might have recently dealt with a similar issue.

It was suggested by some lawyers that the Bureau should request that they file electronic copies of all relevant documents in a specified format. Information on forms would not have to be re-entered into the Bureau's tracker system, the paper copy could be stored and the electronic copy sent to officers on the file. Electronic annotations could be used to flag important issues to team members.

One other suggestion was that the Bureau scan paper filings upon receipt. Only those documents required for review would be scanned and a numbering scheme and index could be developed for this purpose. This would cut down on paper flow, time and cost.

These two ideas are being considered as part of the Bureau's Evidence Handling Project.

There were other suggestions:

- officers should use laptops when conducting interviews to minimize duplication (i.e. transferring written notes to electronic format);
- the Bureau should make more use of CD ROMs; and
- the Bureau should make it possible for the short and long forms to be completed electronically.

Increased use of technology would also reduce the amount of time required to produce assessments, news releases and backgrounders. The Bureau would be moving in the same direction as the courts and the Competition Tribunal, and would be better prepared to take a case, electronically, to the Tribunal.

On the specific issue of electronic filings of notification, most lawyers did not feel that the Bureau should be in any great hurry to provide this service, as they had concerns related to a number of issues including client signatures, security and compatibility, and sign off by a company official. Some lawyers noted that they would still have to send many documents in paper format; others suggested that while almost all documents exist electronically they are often in different formats necessitating substantial work for conversion.

Some lawyers recognized the need for and benefit of electronic filing. Others simply felt that the infrastructure was not fully in place to support electronic filing.

In summary, a recommendation of several of those interviewed was that it was vital that the Bureau focus considerable effort on modernizing work processes and tools both for efficiency reasons and to keep up with public demand.

This issue is being addressed through such Bureau initiatives as the Work Processing Project[66], Evidence Handling[67], and the Bureau Information Management System (BIMS)[68].

Planning

An issue consistently raised during the interviews was whether the Branch was undertaking sufficient planning to effectively meet its responsibilities. There were suggestions that the Bureau should take a more pro-active role in foreseeing trends and preparing itself for future merger activity and other significant mergers. It was suggested that some of the revenue the Bureau receives be used to have academics or industry experts provide research and information on future trends in key industries. This would give staff a head start when faced with a merger in a key or fast-moving industry.

The Branch could conduct annual or periodic environmental scans to ensure that it has the knowledge and expertise to address new issues as they arise. "The Branch can consult the World Bank, economic experts etc. to foresee trends and prepare accordingly. This, in the long run, will save time and money for the Branch and merging parties." "They can sponsor economic 'think tanks' to develop papers on emerging issues like technology, energy, telecom, etc."

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[66] The Public Service Survey of 1999 identified that over 45 percent of employees at the Bureau felt that the quality of their work suffered because of too many approval levels. Employees of the Bureau along with a private consultant undertook a Bureau-wide assessment (management, officers and support staff, regions included) via focus groups and interviews to find out how they thought present work processes and work flow for both substantive work processes (case work) and administrative processes (dockets, press releases, travel claims, contracts) could be improved. The results are currently being assessed by Bureau managers.

[67] The Bureau's project deals with the handling and identification of documentary and physical evidence obtained or received by the Commissioner in the course of an inquiry or investigation to ensure that the evidence will be admissible and given due weight in any subsequent legal proceedings. "Documentary" evidence includes electronic records, as well as traditional paper documents. "Physical" evidence includes other tangible objects.

[68] The purpose of the BIMS project is to identify the operational and management information requirements of the Bureau in the context of being able to track and generate reports on the work that is being done on a Bureau-wide system accessible at every workstation. This is essentially a redesign of the current tracker systems to allow for the capture of more relevant information, increased inter-branch information sharing, and enhanced report generation capability.

Another suggestion was that the Branch should conduct weekly reviews of its caseload to quickly "shut-down" those cases with no competition issues or minimal overlap.

As a means to address training and mentoring issues, it was suggested that the Branch ensure an appropriate balance of experienced and less experienced officers when forming large teams for complex and very complex cases. Less experienced officers could be given responsibility for research and third-party contacts, while more senior officers would be primarily responsible for the substantive analysis.

A number of lawyers also felt that the Bureau should ensure that case theories are developed early in the review process. This would reduce the amount of information requested by the Bureau and would focus the review thus reducing review time. There were suggestions that Department of Justice lawyers should be involved much earlier in case assessments to help develop the theory of a case; junior lawyers should be dedicated to the Branch to perform this function. It was felt that when and if issues become more complex, the "heavy hitters" could be brought into the process. This would ensure that the case is developed with a broader enforcement view in mind in case of challenges and litigation.

This is being addressed through the Re-engineering Project involving the Competition Law Division, Justice Canada.

The importance of post-mortems was also stressed as a way of improving knowledge and the process. It was suggested that the Bureau should hire an experienced competition law economist to do post-assessments on important cases. Valuable lessons could be learned on how to improve the process and analysis.

The Bureau should also encourage parties to meet confidentially with the merger review staff early in the process. This would provide the Bureau with the opportunity to harness the necessary resources and prepare ahead of time.

Finally, many noted that the bar must also take responsibility for the manner in which it conducts business with the Bureau. If counsel are forthcoming with information and provide complete briefings and explanations ahead of time regarding peculiarities of a case, a better working relationship will be established and merger reviews generally will go more smoothly.

Annex A: Stakeholders Interviewed

Toronto

Law Firm	Names
Smith Lyons Scotia Plaza Tower 58th Floor, 40 King Street West Toronto, Ontario, M5H 3Z7	Bruce M. Graham Eric Adelson
Stikeman, Elliott Commerce Court West 199 Bay Street Toronto, Ontario, M5L 1B9	Lawson A.W. Hunter, Q.C.
Fraser Milner Casgrain 1 First Canadian Place 39th Floor, 100 King Street West Toronto, Ontario, M5X 1B2	Randy Hughes Tracey Patel et al.
Osler, Hoskin & Harcourt 1 First Canadian Place P.O. Box 50 Toronto, Ontario, M5X 1B8	Timothy J. Kennish Michelle A. Lally et al.
Blake, Cassels & Graydon Commerce Court West Suite 2300, 199 Bay Street Toronto, Ontario, M5L 1A9	Warren M.H. Grover et al.
Lang Michener Suite 2500, BCE Place 181 Bay Street P.O. Box 747 Toronto, Ontario, M5J 2T7	James B. Musgrove
Borden Ladner Gervais Scotia Plaza Suite 4100, 40 King Street West Toronto, Ontario, M5H 3Y4	Robert S. Russell
Goodmans Eaton Towers (Eaton Centre) 24th Floor, 250 Yonge Street Box 24 Toronto, Ontario, M5B 2M6	William Rosenfeld Robert Vaux

Davies Ward Phillips & Vineberg 44th Floor, 1 First Canadian Place Toronto, Ontario, M5X 1B1	Calvin S. Goldman, Q.C. Paul S. Crampton
Kelly Affleck Greene Suite 840, 1 First Canadian Place P.O. Box 489 Toronto, Ontario, M5X 1E5	Donald S. Affleck, Q.C. Donald B. Houston
Davis & Company Park Place Suite 2800, 666 Burrard Street Vancouver, British Columbia, V6C 2Z7	Stanley Wong
Fasken Martineau DuMoulin Toronto Dominion Bank Tower, P.O. Box 20, Stn. Toronto Dominion Toronto, Ontario, M5K 1N6	Anthony F. Baldanza et al.

Montréal

Stikeman, Elliott 40th Floor, 1155 René-Lévesque Blvd. W Montréal, Quebec, H3B 3V2	Francine Matte, Q.C.
Ogilvy Renault Suite 1100, 1981 McGill College Avenue Montréal, Quebec, H3A 3C1	Robert Cowling Denis Gascon
McCarthy Tétrault "Le Windsor" 4th Floor, 1170 Peel Street Montréal, Quebec, H3B 4S8	Yves Bériault Madeleine Renaud Yves Comtois

Annex B: Example of E-mail response

Re: Service Level Dates for Your File XXXXXXXXXXXX

I am writing in regard to your letter of xxxxxxxxxxxx requesting the issuance of an Advance Ruling Certificate pursuant to section 102 of the *Competition Act* and your short-form notification filing pursuant to section 16 of the *Notifiable Transactions Regulations* with respect to the above-noted transaction.

We have reviewed the material submitted and determined this matter to be classified as non-complex. The corresponding service standard period is 14 calendar days.

The information that you have provided in support of your request is sufficient to commence the Bureau's review. In addition, third party contacts will not be required. As a result, the service standard period commenced xxxxxxxxxxxx, the date that your request was received by the Bureau, and will end on xxxxxxxxxxxx.

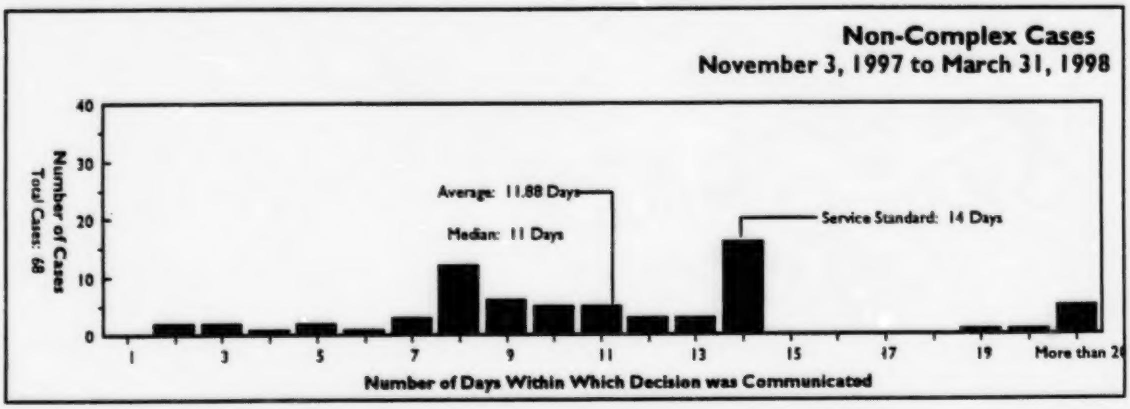
Should you wish to discuss or have any questions concerning this matter, please contact the reviewing officer, xxxxxxxxxxxxxxxxxxxxxx at (tel no.) xxxxxxxxxxxx.

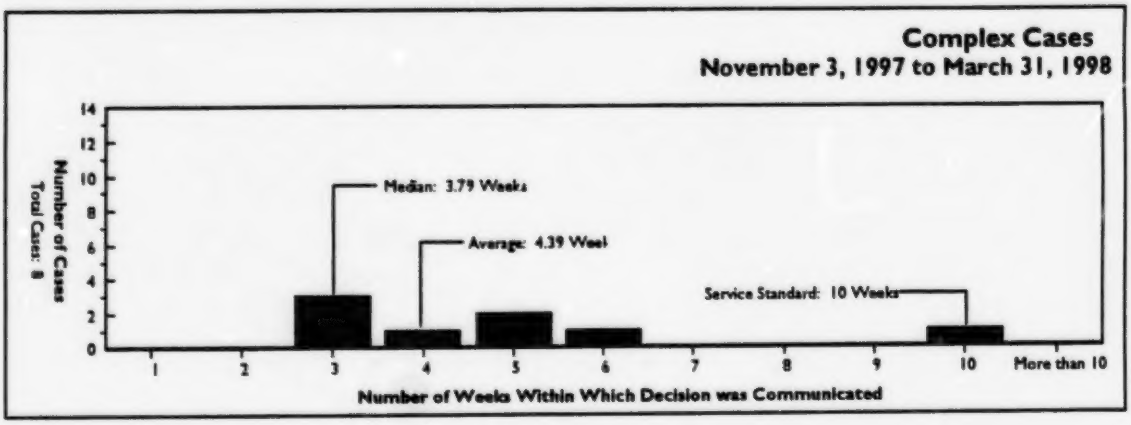
Yours sincerely,

Michael Sullivan
Senior Competition Law Officer
Merger Notification Unit
(819) 953-4297
sullivan.mike@ic.gc.ca

Annex C

Meeting the Service Standard target: 1997/1998[69] to 2000/2001


Non-Complex Cases
November 3, 1997 to March 31, 1998


Complex Cases
November 3, 1997 to March 31, 1998

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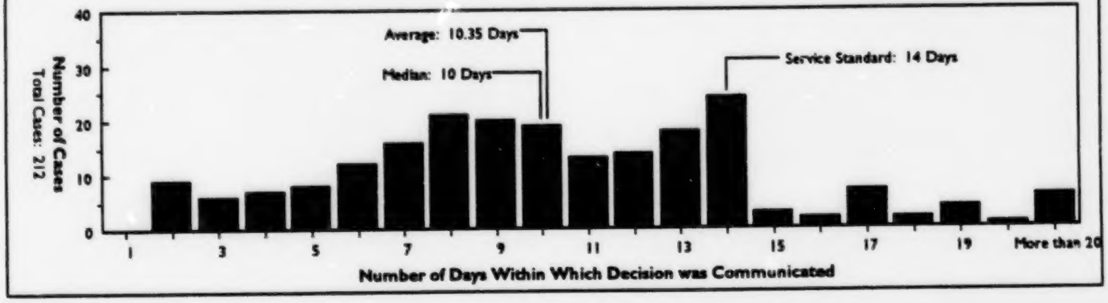
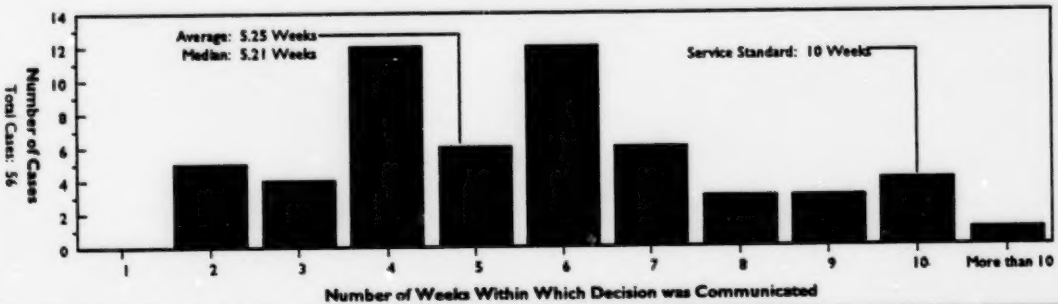
[69] There were no very complex cases completed during this period. All securitizations have been excluded.

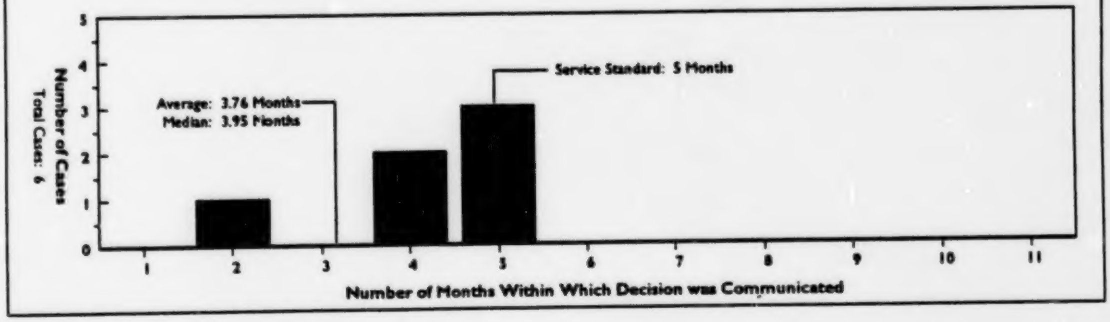
Non-Complex Cases
Fiscal Year 1998/1999

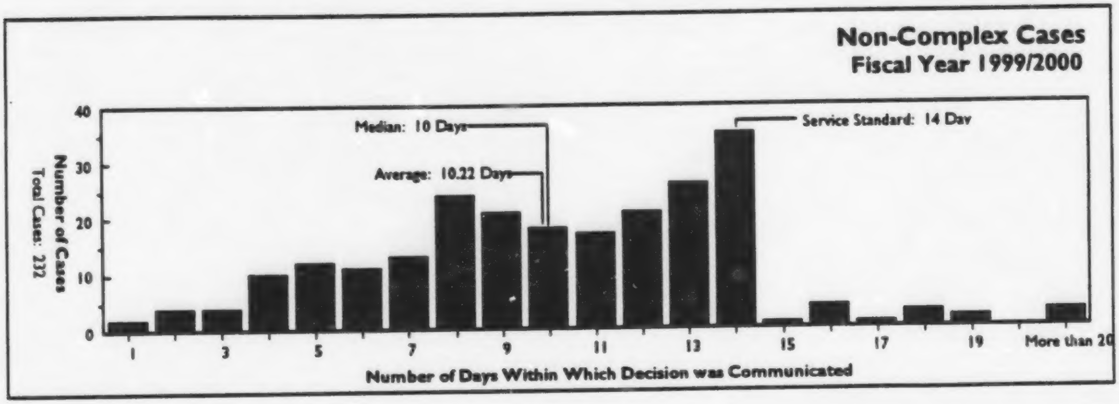


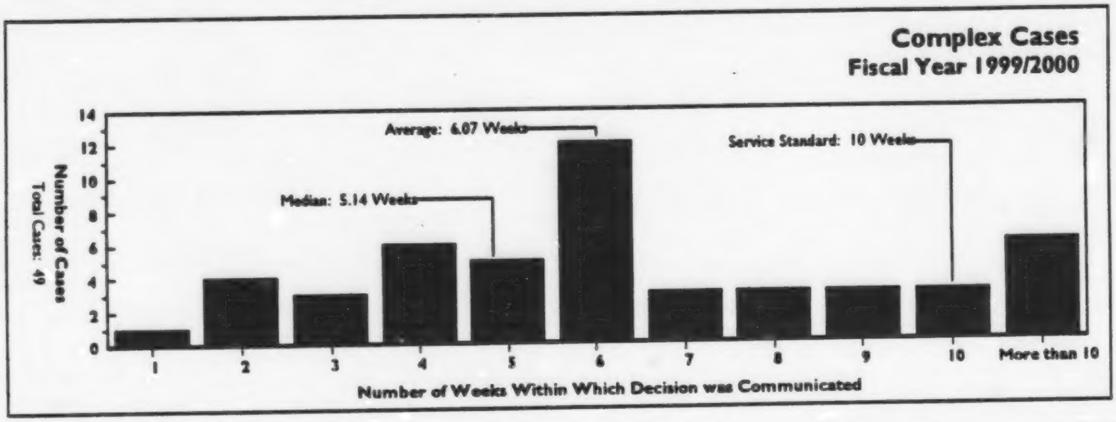
Complex Cases
Fiscal Year 1998/1999

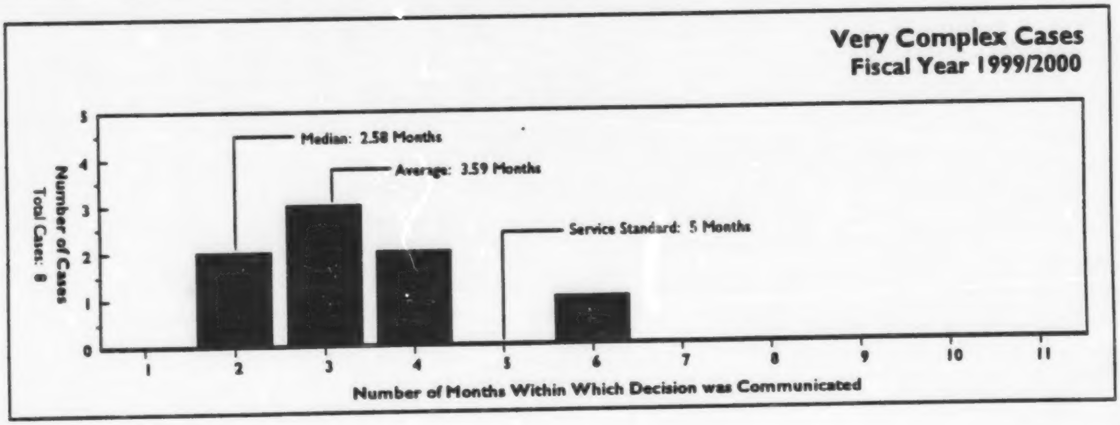


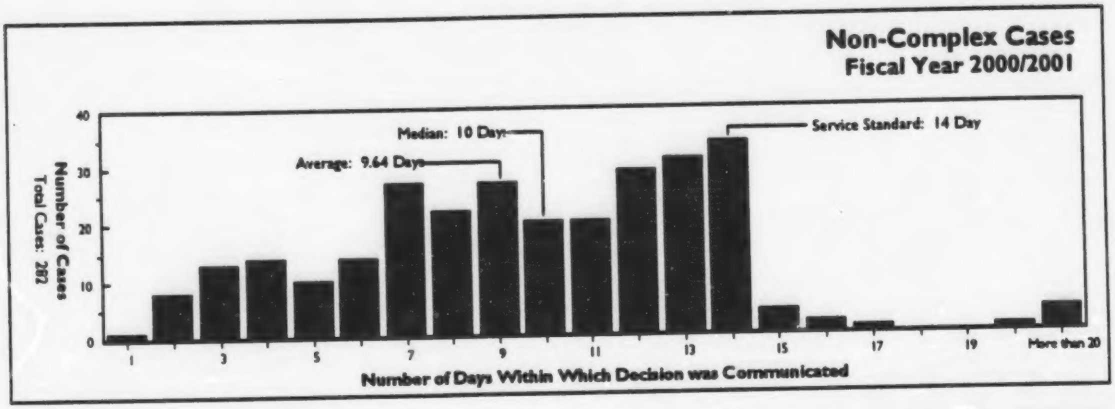
Very Complex Cases
Fiscal Year 1998/1999

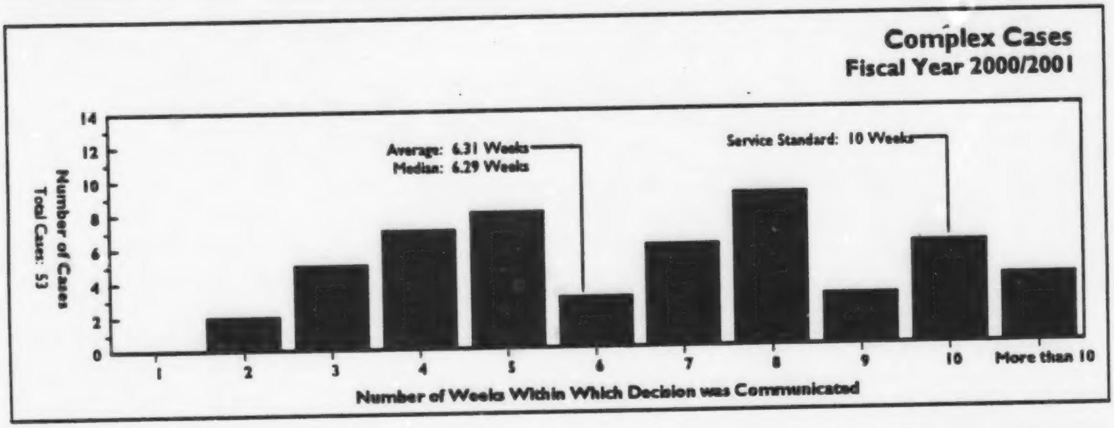


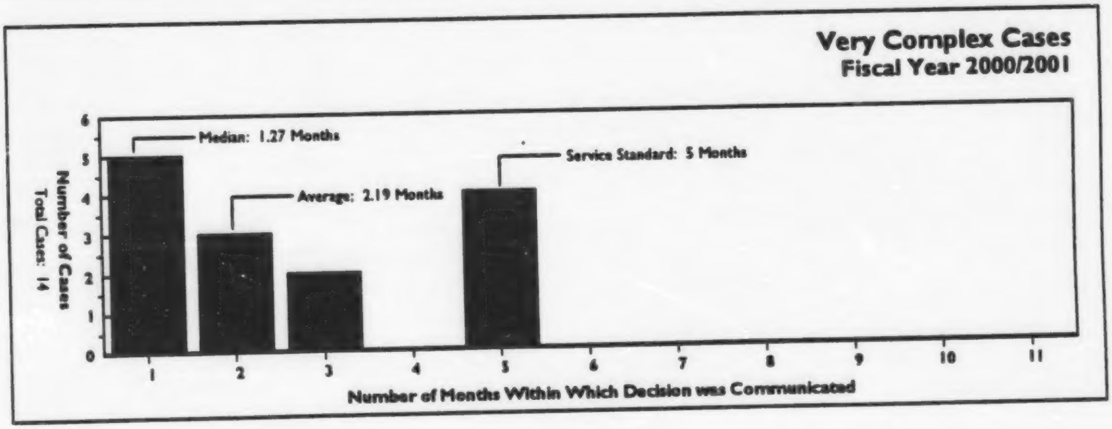

Non-Complex Cases
Fiscal Year 1999/2000
Number of Cases
Total Cases: 232
0
10
20
30
40
Median: 10 Days
Average: 10.22 Days
Service Standard: 14 Day
1
3
5
7
9
11
13
15
17
19
More than 20
Number of Days Within Which Decision was Communicated


Complex Cases
Fiscal Year 1999/2000
Number of Cases
Total Cases: 49
0
2
4
6
8
10
12
14
Average: 6.07 Weeks
Median: 5.14 Weeks
Service Standard: 10 Weeks
1
2
3
4
5
6
7
8
9
10
More than 10
Number of Weeks Within Which Decision was Communicated


Very Complex Cases
Fiscal Year 1999/2000
Number of Cases
Total Cases: 8
0
1
2
3
4
5
Median: 2.58 Months
Average: 3.59 Months
Service Standard: 5 Months
1
2
3
4
5
6
7
8
9
10
11
Number of Months Within Which Decision was Communicated


Non-Complex Cases
Fiscal Year 2000/2001


Complex Cases
Fiscal Year 2000/2001


Very Complex Cases
Fiscal Year 2000/2001

Report on Feedback for Mergers-related Services

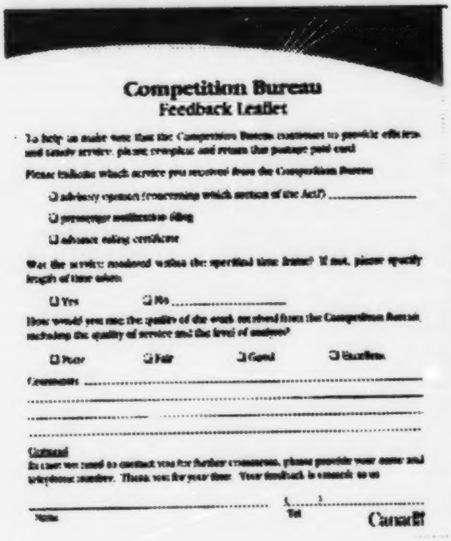
Chapter 8

This chapter, which complements Chapter 7 - Interviews with the Private Bar, is a compilation of data and comments received from outside clients and stakeholders since the implementation of fees for merger related services on November 3, 1997.[70] The Bureau regularly receives this information on the feedback leaflets that stakeholders complete and return. The chapter also summarizes letters received over the same period addressed to various members of the Mergers Branch about specific cases.

When developing the fee and service standards policy in 1997, the Bureau also included feedback mechanisms to ensure that those who sought services or were bound by regulatory processes for which a fee applied had timely and systematic opportunities to provide ongoing input regarding service levels and quality. These mechanisms include feedback leaflets, a complaint mechanism[71] and periodic fora with stakeholders.

Feedback leaflets (with self-addressed stamped envelopes) are sent to stakeholders along with the service requested (advance ruling certificate, prenotification response, advisory opinions). These cards enable the Bureau to gauge the level of satisfaction of its clients, and to ensure that the Bureau provides the best service possible in the most efficient and professional manner. Analysis of feedback leaflets is one of several methods the Bureau uses to assess stakeholder satisfaction.

Feedback Leaflet



Competition Bureau
Feedback Leaflet

To help us make sure that the Competition Bureau continues to provide efficient and timely service, please complete and return this postage paid card.

Please indicate which service you received from the Competition Bureau

☐ advisory opinion (concerning which section of the Act?) ____________

☐ premerger notification filing

☐ advance ruling certificate

Was the service rendered within the specified time frame? If not, please specify length of time taken.

☐ Yes ☐ No ____________

How would you rate the quality of the work received from the Competition Bureau, including the quality of service and the level of analysis?

☐ Poor ☐ Fair ☐ Good ☐ Excellent

Comments ____________

Optional
In case we need to contact you for further comments, please provide your name and telephone number. Thank you for your time. Your feedback is valuable to us.

Name ____________ Tel ( ) ____________

Canada

Below are tables that include complete details about all of the feedback leaflets the Bureau received between November 1997 and March 31, 2000 that relate to merger review. During this period, the Bureau received 835 requests for merger review services. Stakeholders returned 206 feedback leaflets, which represent comments on 25 percent of the services requested.

The following table indicates the type of service requested, whether the client received the service within the specified time (service standards) and the quality of service.

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[70] The word *service* for the purposes of this document refers to the Bureau's work on an advance ruling certificate request, a prenotification filing or an advisory opinion.

[71] Competition Bureau. *Fee and Service Standards Handbook pursuant to the* Competition Act. Release 2. May 1, 1998. Page 7.

Table 1. Feedback leaflets Received from November 1997 to March 2000

Service	Total	Service Rendered Within Specified Time		Quality of Service			
		Yes	No	Excellent	Good	Fair	Poor
Advance ruling certificate	120	108	11	86	28	4	1
Pre-merger notification filing	48	43	5	28	16	2	2
Pre-merger notification filing and advance ruling certificate	35	34	1	29	3	0	1
Advisory opinion	3	2	1	1	2	0	0
Total	**206**[72]	**187**	**18**	**144**	**49**	**6**	**4**
Percentage	100%	91%	9%	70%	24%	3%	2%

(Note: one card had no indication of the service standard and two had no indication of the quality of work received. A number of these feedback leaflets apply to more than one service, as more than one service can be involved in the same request. For example, one request can involve an advance ruling certificate and a prenotification.)

Table 1 indicates that service standards were met in 91 percent of the cases in which a feedback leaflets was returned, which is in line with the Bureau's overall performance as reported in previous Annual Reports. The quality of service was considered to be "excellent" in 70 percent of cases and "good" in a further 24 percent, again when a card was returned. The information does not indicate whether the cases were non-complex, complex or very complex.

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[72] It is not currently possible to determine the exact number of cards that were received in any given year as cards were not numbered or tracked by date. Since April 1, 2000, the Bureau has been numbering and date-stamping these cards upon receipt in order to more accurately conduct statistical analysis. The Bureau considered pre-numbering the cards but rejected this, feeling that stakeholders might be less inclined to complete and return the cards if they thought that the Bureau could trace them to a specific file. Many cards do not include the name of the respondent. As discussed in Chapter 7 - Interviews with the Private Bar, stakeholders are sometimes reticent to provide feedback due to the perception that there could be repercussions on future files.

The question[73] on the feedback leaflets about quality of service is intended to measure stakeholder satisfaction with the Bureau's service (e.g. accessibility and timeliness) and level of analysis. It is apparent, however, that the majority of comments on the feedback leaflets related to timing and not the other components of quality service. (This is an indication that the Bureau should modify the feedback leaflets to focus on specific aspects of quality, such as accessibility, client service, etc.)

The study also uncovered the differences in response between those cases where standards were met and those where they were not.

Table 2 indicates the quality of service associated with each of the services when service standards were met. The quality of service can be rated as excellent, good, fair or poor.

Table 2. Service Standards Met, 1997 to March 2000

Service	Total	Quality of Service			
		Excellent	Good	Fair	Poor
Advance ruling certificate	108	82	23	2	1
Pre-merger notification filing	43	27	15	1	0
Pre-merger notification filing and advance ruling certificate	34	29	3	0	0
Advisory opinion	2	1	1	0	0
Total	**187**	**139**	**42**	**3**	**1**
Percentage	100%	73%	23%	1.5%	.5%

Stakeholders rated the service as excellent in 73 percent of cases and as good in 23 percent of cases. Only four cards indicated that the service was fair or poor despite the fact that, in their opinion, service standards had been met.

Table 3 indicates the quality of service associated with each of the services when the service standards were not met.

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[73] How would you rate the quality of the work received from the Competition Bureau, including the quality of service and the level of analysis? Poor, Fair, Good, Excellent.

Table 3. Service Standards Not Met, 1997 to March 2000

Service	Total	Quality of Service			
		Excellent	Good	Fair	Poor
Advance ruling certificate	11	4	5	2	0
Pre-merger notification filing	5	1	1	1	2
Pre-merger notification filing and advance ruling certificate	1	0	0	0	1
Advisory opinion	1	0	1	0	0
Totals	**18**	**5**	**7**	**3**	**3**
Percentage	100%	27%	39%	17%	17%

Out of a total of 206 feedback leaflets, only 18 indicated that the service standards were not met. It is important to note that even in these 18 cases, the quality of service was rated as excellent or good in two thirds of the cases.

It would, therefore, appear that meeting or not meeting the service standard for time of reply is not the only determinant of quality of service and that other factors associated with quality of service, such as quality of analysis, accessibility and client service are also important.

In addition, *timeliness* for the purposes of the feedback leaflets means meeting the service standard, and in this regard the performance is excellent. However, this definition of timeliness should not be confused with the actual time it takes to complete the review about which, as noted in Chapter 7 - Interviews with the Private Bar, lawyers have expressed some concerns.

Comments from Stakeholders

The last field of the feedback leaflets is the comments field. This field was created so stakeholders could provide any additional comments to the Bureau related to the specific service for which the card was completed. It is assumed that parties who do not provide their name and telephone number wish to remain anonymous.

The comments field was completed on 123 cards, or 59.7 percent of the 206 cards received. Of these, 93 cards, or 76percent, contained positive comments, 25 cards, or 20 percent, contained negative comments, and 5 cards contained general comments (see Table 4).

Table 4. Feedback leaflets with Comments

	Total Cards with Comments	Positive Comments	Negative Comments	General Comments
Comments when **service standards met**	111	89 (80%)	17 (15%)	5 (5%)
Comments when **service standards not met**	12	4 (33%)	8 (67%)	——
Total	123 (100%)	93 (76%)	25 (20%)	5 (5%)

The comments included on the cards fall into the same two themes that emerged in the interviews with the private bar: timeliness and consistency/predictability.

In addition to feedback leaflets, employees of the Mergers Branch occasionally receive letters from stakeholders related to specific files. In fiscal year 1999–2000, the Branch received 16 such letters, all directed to an individual or a group of individuals who worked on a specific transaction and all containing positive feedback.

Timeliness

Most of the written comments refer mainly to issues of timeliness rather than the level of analysis of the case. Most stakeholders were quite pleased with the responsiveness of officers, as evidenced by the following comments: "terrific turnaround time and truly superior service," "very quick delivery," "excellent turnaround," "the Bureau was sensitive to our contractual timing issues and responded promptly," and "constantly impressed by the responsiveness of the Bureau to the timely demands that certain commercial transactions impose."

Only 25 (20 percent) cards included negative comments, grouped as with the positive comments, in familiar themes. More specifically, several cards indicated that there were delays, the "reviewing took far too long," "the file seemed to disappear into a black hole for a while" and "inappropriate advice resulting in delays occurred."

Consistency and Predictability

Of the 20 percent of the leaflets that included negative comments, some referred to the information required by the Bureau and the predictability of the process:

- "Seems to be some confusion in what info they want;"
- "We were very concerned with the level and quality of analysis and questions from his immediate supervisor;"

- "Did not hear from the Bureau for a week after filing as to who was handling matter and if time frame would be met. Led to uncertainty;" and
- "Confirmation letter sent out on expiry of waiting period, letter indicated assessment not complete when in fact it was"

Conclusions

The responses on the feedback leaflets mirror Bureau statistics in that more than 90 percent of reviews are conducted within the service standard time frame. The positive comments are primarily related to success in meeting these standards and the commercial requirements of the parties. The negative comments mirror the concerns raised in the interviews with lawyers, namely timeliness, consistency and accessibility.

It is important to note that, as evidenced by comments on feedback leaflets and in interviews, members of the Mergers Branch are very highly regarded by stakeholders. They are seen as professional, dedicated and conscientious of business deadlines.

Recommendations

The feedback leaflet should be reviewed to ensure that it is indeed capturing the type of information the Merger Branch needs in order to continue to improve various aspects of the merger review process. The Branch might consider adding a field in which stakeholders would indicate the complexity of the file. This would enable to Branch to identify more specifically the area or process that requires attention. The card should also request stakeholder feedback about specific quality criteria, such as timeliness and accessibility.

Compliance and Coordination Directorate should receive the cards and provide a summary to the Mergers Branch. Photocopies of feedback leaflets should no longer be sent to the Mergers Branch. Adopting this new approach might encourage more individuals to complete and return the cards.

Multi-Jurisdictional Merger Review

Chapter 9

With globalization and trade liberalization, it is apparent that an increasing number of the mergers and acquisitions that the Mergers Branch reviews involve more than one jurisdiction. This increase in multi-jurisdictional merger reviews requires that the Bureau and other competition agencies seek ways to minimize the impact of differences between agencies' merger review procedures and to cooperate with other competition agencies to ensure the most efficient and effective outcomes from such reviews.

The purpose of this chapter is to raise issues with respect to multi-jurisdictional merger reviews, drawing significantly from the findings from the International Competition Policy Advisory Committee[74] (ICPAC) Report,[75] and to highlight some of the practices that are considered important for effective international cooperation in reviews of multi-jurisdictional mergers. The information in this chapter is based on interviews with Bureau staff, other agencies, Bureau stakeholders, and stakeholders of the Office of Fair Trading in the U.K. and of the U.S. Federal Trade Commission and Department of Justice.

I. Merger Review Processes

While Canadian stakeholders primarily focussed their comments on the Canadian merger review process, references were frequently made to the importance of recognizing that increasingly the Canadian review is only one of many simultaneous reviews. They highlighted the need in these cases for effective cooperation. In addition, some argued that in light of the increasing number of large mergers and in view of the lack of a significant Canadian percentage of the total revenue or assets in many multi-jurisdictional transactions, Canada should focus its resources on the mergers where the Canadian portion of the transaction is significant. This view was put forward by Warren Grover Q.C. in Toronto on June 16, 2000.[76] Such views are a challenge to the Bureau to continue to develop effective cooperation mechanisms.

In the ICPAC Report, the authors note that "with more than 60 nations now having antitrust merger control laws that require (or provide for) antitrust notification, the overlapping regulations are at times unduly burdensome and costly to the merging parties and can cause unnecessary frictions between nations. The question arises whether the systems can be rationalized and still ensure that enforcers have the tools necessary to identify and remedy anti-competitive transactions."[77]

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[74] In 1997, Attorney General Janet Reno and Assistant Attorney General for Antitrust Joel I. Klein formed the International Competition Policy Advisory Committee. The Advisory Committee was asked to consider three topics, namely multi-jurisdictional merger review, the interface of trade and competition issues, and future directions in enforcement cooperation between the U.S. and antitrust authorities, particularly related to anti-cartel prosecution.

[75] *International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General for Antitrust*. Final Report. 2000.

[76] Paper presented by Warren Grover to the Roundtable Discussion; Toronto, June 16, 2000 entitled: *Mega Mergers: Revisiting the Concepts*: "My belief is that the Bureau examines too many of these mega mergers where Canada is virtually irrelevant. I suggest that if the target corporation in any proposed merger has less than 20 percent of its revenue derived from Canadian sales and more than 50 percent of its revenue derived from sales in Europe and the United States, the Bureau should not examine the merger in depth. Several Canadian lawyers are billing significant amounts to clients with respect to such mergers, but I believe it is a wasted effort.... The Bureau should however indicate any Canadian concerns it may have to the competition authorities in the dominant geographic markets where the merger entities will operate."

It is important to recognize that although there have been attempts toward greater convergence in merger review, multi-jurisdictional mergers continue to be complicated in view of legislative and procedural differences among domestic merger review regimes. To quote one practitioner, "Such variances are manifest in different policy objectives, anti-competitive thresholds, analytical factors, information requirements, time limits and remedies, not to mention a host of practical nuances. These differences, coupled with the prospect of reviews in numerous jurisdictions, make multi-jurisdictional mergers complex, time-consuming and expensive. If a boon for antitrust lawyers, the proliferation of regimes has been anything but for clients seeking to transact across borders."[78]

Nonetheless, John J. Parisi, Federal Trade Commission ("FTC"), International Antitrust Division[79] suggests that "the similarities among competition laws and their enforcement are greater than the differences;... cooperation in enforcement is just as necessary when common enforcement goals are sought as when differences arise; [and] enforcement cooperation is broadening and deepening."

As examples of the growing importance for agencies of multi-jurisdictional transactions, consider the following: "In 1999, global mergers and acquisitions were at an all-time high, with approximately $3.4 trillion (U.S.) in activity announced worldwide.[80]" In 1999, of the 68 second requests issued by the U.S. Department of Justice, 18 involved transactions with an international dimension. In addition, in 1999, "Chairman Pitofsky estimated that approximately 50 percent of the mergers investigated by the FTC at any given time have an impact on consumers in more than one country and often require a remedy or a series of remedies that are coordinated among law enforcement authorities in different countries."[81] Likewise in Canada, transnational mergers represent an increasing and important part of mergers reviewed in terms of transactions that raise important competition issues.

The ICPAC Report includes two comprehensive chapters devoted solely to merger review and recommendations for reform. The Committee provides numerous recommendations aimed at improving merger review worldwide. The main recommendations would, in view of the Committee, if adopted consistently by agencies, enhance both the review of purely domestic mergers and those involving more than one jurisdiction. The Report recommendations fall into two general categories: merger review procedures and international cooperation.

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[77] *International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General for Antitrust.* Final Report. 2000. (ICPAC) Page 2.

[78] J. William Rowley QC, A. Neil Campbell. *Multi-jurisdictional Merger Review — Is It Time for a Common Form Filing Treaty?*

[79] John J. Parisi. *Enforcement Cooperation Among Antitrust Authorities.* Presentation to the IBC U.K. Conferences Sixth Annual London Conference on EC Competition Law. London, England. May 19, 1999 (updated March 2000).

[80] *ICPAC* page 3.

[81] *Ibid*, page 47.

Several of the recommendations in respect of merger review procedures, and in particular, those relating to greater transparency, threshold tests for merger notification, review periods and timing, notifications forms and information requests, and post merger review audits, are relevant to this benchmarking study and reflect many of the views expressed within the Bureau and by those interviewed.

ICPAC recommends that agencies should facilitate greater transparency in the application of their merger review principles by enhancing the publication of guidelines, notices, annual reports, statements and speeches. It is suggested that clearly articulating an agency's rationale for challenging, or refraining from challenging, significant transactions (that is, decisions that set precedent or otherwise indicate a shift in doctrine or policy) would enhance understanding both by merging parties and by other agencies in a multi-jurisdictional context.

ICPAC recommends increased transparency not only with respect to policies but also in relation to decisions on specific transactions. The Report cites the practice in the EU: "To initiate a second-stage investigation, the EC must set forth reasons for the investigation, alerting the parties to the specific areas of concern. The result is a large body of precedent to guide future parties and agency officials."

The Report also commented favourably on the Canadian approach and long tradition of issuing detailed backgrounders in certain high-profile transactions and transactions that raise novel issues when the Competition Bureau decides not to challenge certain transactions. One Canadian lawyer explained that great value is placed on these backgrounders, in part because jurisprudence in the field is so limited.

ICPAC set out two recommendations on thresholds, the first being that the jurisdictions cast the merger net appropriately "to ensure that they incorporate an appreciable and objectively based nexus to the economy or the jurisdiction." In this regard, ICPAC sees Canada as a positive example, whereby "to trigger a notification obligation the target company must carry on an operating business in Canada coupled with Canadian assets/sales tests." The second recommendation is that thresholds should only be as broad "...as necessary to ensure the reporting of potentially problematic transactions."[82]

With respect to review periods and timing, ICPAC recommends that merger review should be conducted in a two-phased approach designed to enable enforcement agencies to identify and focus on transactions that raise competitive issues while allowing those that present none to proceed expeditiously.[83]

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[82] *ICPAC* page 156.

ICPAC commends the flexibility of the U.S. pre-merger notification system, which permits filing at any time after the execution of a letter of intent, contract, agreement in principle, or public bid. It also commends the U.S. for concluding their initial review in a maximum of 30 days following notification. The Report recommends, however, that more certainty with respect to time frames is needed for the second-stage review.

ICPAC recommends some form of certainty with respect to review timing, such as fixed time limits, but notes its "concern that maximum time periods would effectively turn into minimum or standard review periods." Because of these concerns, "...the majority of Advisory Committee members eschew strict time frames but recommend instead that alternative steps be taken to provide the greater certainty required for effective transaction planning." ICPAC recommends instead non-binding but notional time frames for second-stage review that vary in relation to the relative complexity of the transaction. The Report cites as the example of such an approach the system adopted in Canada and notes that the five-month period for very complex transactions "coincides with the aggregated five-month review period employed by the EC for mergers that are subjected to second-phase investigations."[84]

In terms of notification forms and information requests, ICPAC recommends that the initial notification require only information necessary to make a preliminary determination of whether a transaction raises competition issues sufficient to warrant further review. The Report further notes that "mechanisms also should be established to narrow the legal and factual issues as early as possible."[85] The Report suggests that one way to accomplish this goal would be to provide a short-form long-form option, leaving it to notifying parties to choose in the first instance which form to use.

The Report covers the Canadian approach to notification in considerable detail and comments favourably on the option available to choose a short or long form and the availability of advance ruling certificates.

Finally, the ICPAC Report recommends that agencies should assess their performance with respect to those transactions they challenge and those important transactions that are not challenged.

In this regard, it is interesting to note that a post-decision review of the decisions in a number of recent merger cases examined by the U.K. Office of Fair Trading was completed in

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[83] For example, Rowley and Campbell find that most jurisdictions currently clear at least 95 percent of transactions as non-problematic in an average time of one month or less. J. William Rowley QC, A. Neil Campbell. *Multi-jurisdictional Merger Review - Is It Time for a Common Form Filing Treaty?* Page 9.

[84] *ICPAC* page 160.

[85] *Ibid* page 114.

1999. According to an article published in the *Global Competition Review*, a study prepared for the OFT enabled the agency to assess the post-decision market conditions in markets where a proposed transaction was challenged and in others where the transaction was allowed to proceed. Such a study provides an agency with valuable research and feedback on its analysis and decision making.

There is a large amount of work being done internationally to promote international convergence in merger review procedures and to identify and develop best practices in multi-jurisdictional merger reviews. In particular, Working Party No. 3 on International Cooperation ("WP3") of the OECD Competition Law and Policy Committee, in conjunction with the Business and Industry Advisory Council to the OECD, are currently considering possibilities for and mechanisms to promote convergence of merger review procedures. The outcomes from any work in international fora, such as WP3, will be useful in guiding any further work in this area.

II. International Cooperation

Given the increase in multi-jurisdictional mergers and their increasing complexity, the number of cases involving cooperation between competition agencies rises steadily every year. In addition to the mere increase in the number of shared cases and informal exchanges, the breadth of coordination between agencies has also become more significant. Cooperation now begins earlier in the merger review process, involves more detailed discussion of substantive issues, and often follows through to coordination at the remedial stage.

A corollary to this is that many agencies are also of the view that companies should recognize the value of supporting early cooperation between agencies and attorneys as a means of increasing the possibility of avoiding inconsistent demands and conflicts between two or more agencies.

Cooperation can take place both formally and informally. Although a formal framework is not a prerequisite to cooperation, it can foster communication and coordination between competition authorities.[86]

An increasingly regular practice is for jurisdictions to consult one another to try to come to an agreement on product and geographic market definitions and potential remedies. There are more instances of agencies sharing information and engaging in discussions much earlier in the review process than there have ever been in the past.

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[86] The mechanisms by which enforcement agencies cooperate are embodied in the 1995 Organisation for Economic Co-operation and Development *Recommendation on Cooperation*. A number of agreements also exist namely the 1995 Agreement Between the Government of Canada and the Government of the United States of America Regarding the Application of their Competition and Deceptive Marketing Practices Laws, the 1999 Agreement Between the European Communities and the Government of Canada Regarding the Application of their Competition Laws and the 2000 Arrangement between the Competition Bureau, the Australian Competition and Consumer Commission and the New Zealand Commerce Commission Regarding the Application of their Competition and Consumer Laws. These agreements include notification provisions that require each party to provide information about planned activity that might affect the other's interests. Such provisions also exist in the Chapter on Competition Policy in the Canada-Costa Rica Free Trade Agreement.

In this new global enforcement environment, companies can now expect that "reviewing agencies will cooperate to the fullest extent permitted by law, with or without the parties' consent. The parties can choose to facilitate this cooperation by waiving confidentiality which in most instances will prove beneficial."[87]

Competition authorities engage in frequent discussions and share non-confidential information. However, many jurisdictions have legislation prohibiting the exchange of confidential information. While the Competition Bureau can exchange confidential information to foreign authorities if doing so is for the purposes of the "administration and enforcement" of the *Act*, other authorities may require a waiver for a reciprocal exchange of information with the Bureau.

As mentioned above, the ICPAC Report included recommendations to enhance international cooperation in reviews of multi-jurisdictional mergers. The Report states that "cooperation among reviewing agencies could be enhanced if all jurisdictions were to establish a transparent legal framework for cooperation that contains appropriate safeguards to protect the privacy and fairness interests of private parties."[88]

The ICPAC Report recommends the development of protocols to govern cooperation that would include a description of the way the antitrust enforcement agencies conduct crossborder coordinated merger investigations. This, ICPAC suggests, would facilitate further substantive convergence and avoid or minimize divergent analysis and outcomes.

The Report goes on to suggest that "although a great deal of cooperation can take place without the consent of the parties to a transaction, there are limits on the extent to which antitrust enforcers can exchange information and employ other cooperative approaches... One important step in fostering this mutually beneficial cooperation between companies and competition authorities lies in instilling confidence in companies that the jurisdictions receiving confidential information can and will protect that information from disclosure."[89]

Development of such protocols would, the Report suggests, contribute to building that confidence. According to the Report, a protocol should have the following key features:

- A description of the way in which the antitrust enforcement agencies typically will conduct joint and coordinated merger investigations with antitrust authorities in other jurisdictions;

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[87] John J. Parisi. *Enforcement Cooperation Among Antitrust Authorities*. Before the IBC U.K. Conferences Sixth Annual London Conference on EC Competition Law. London, England. May 19, 1999 (updated March 2000).

[88] *ICPAC* page 6.

[89] Bid page 66.

- a range of model waivers permitting discussions otherwise prohibited by confidentiality laws and authorizing the exchange of statutorily protected information by competition authorities during merger reviews; and
- a model policy statement outlining safeguards established by competition authorities to protect confidential information.

The ICPAC Report provides examples of model waivers and a model policy statement.

In addition, ICPAC recommends frank information exchanges between competition authorities and merging parties as being an important component for effective cooperation.

To quote the Report, "[t]o facilitate quick resolution of potentially problematic transactions deemed worthy of further investigations and focus the issues as soon as possible, there is no substitute for frank information exchange between competition authorities and the parties to a proposed transaction. To that end, each reviewing authority should articulate to the merging parties at the beginning of the second stage inquiry, the competitive concerns that are driving the investigation."

Recently both the U.S. Department of Justice and the Federal Trade Commission committed to providing parties with the outstanding issues at the time of the issuance of a second request and the rationale behind the information sought in the second request. (Refer to Chapter 5 - Merger Review in the United States for additional details.)

In a similar vein, the ICPAC Report pointed to the process in the EU in which parties routinely discuss the information requirements of the Merger Task Force with respect to filling out the Form CO, and the process of negotiating the content of the Form. This provides both sides with the opportunity, before the 30-day legislated time frame, to identify the important issues and focus the review and required information.

Best Practices for International Cooperation

As mentioned earlier, international efforts promoting convergence of merger review procedures are underway in the OECD WP3 to identify and develop best practices in international cooperation in multi-jurisdictional merger review. Notwithstanding such efforts, it is clear, based on the discussions within the Bureau, with officials in other agencies and other stakeholders, as well as certain of the findings in the ICPAC Report, that certain practices can be important for effective international cooperation in reviews of multi-jurisdictional mergers. The following is a non-exhaustive list of some practices considered effective for international cooperation. This list will undoubtedly evolve and expand considerably over the next few years.

1. Early Identification of Other Reviewing Agencies

In Canada, as part of the notification filing provided to the Bureau, the parties are required to identify other foreign authorities which have been notified of the proposed transaction and the date of the notification. Similarly, the U.S. Federal Trade Commission, as a general practice, requests that merging parties indicate when there are interests in other jurisdictions. In such instances, they regularly request waivers from the parties in order to facilitate discussions with their counterparts. In addition, when the FTC learns that a proposed merger is subject to the EU's Merger Control Regulation, FTC staff now routinely ask the parties to provide a copy of their Form CO.

2. Early Notice to Management of Multi-jurisdictional Issues

Another very important issue is for managers and relevant senior officials in the agency to be apprised of all trans-border transactions. Because of experience in this arena, managers are likely to be more cognizant of issues or sensitivities that might influence a transaction or could have other crossborder implications.

3. Notification

For successful cooperation between competition agencies, it is important for agencies to recognize the important interests of other countries and notify pursuant to the OECD Recommendation or the other cooperation arrangements in place. In addition to formal notifications, however, informal contacts are equally beneficial for cooperation. Whether formally or informally, early and frequent contact between competition agencies is essential.

4. Exchange of Information

Although a significant amount of non-confidential information can be exchanged between competition agencies, in some cases a confidentiality waiver from the parties will be necessary to allow for more extensive cooperation and permit the exchange of confidential information.

5. Understanding the Context

It is important to engage the parties in the cooperation process. While the provision of waivers is an obvious instance of the parties' role in the cooperation process, this role can go beyond the mere exchange of waivers. Agency staff should encourage counsel to make sure that both they and the agency are aware of issues in other jurisdictions that may have an impact on the transaction overall.

6. Coordination of Information Requests

Many lawyers interviewed pointed to the substantial amount of time required to comply with information requests. When different agencies seek similar information on a given transaction, it takes considerable time to produce it in different formats. The process could be streamlined if information requirements were coordinated to the extent possible by the agencies involved. Similarly, from the perspective of the competition agency, there is a benefit to collaborating with other agencies on the manner in which certain information on a common issue is requested from the parties.

7. Transparency

There is great value in agencies publicly citing those instances when multi-jurisdiction cooperation has led to successful reviews and merger resolutions. Increased transparency of these types of cases can help improve the understanding of the processes and decisions of other agencies and help enhance cooperation in the future.

Similarly, agencies strongly recommend that staff should disclose to parties that officers may be speaking with other agencies. Disclosing such a fact to the parties at the outset allows parties to be more open and consistent in their responses to agencies.

8. Jointly Work Towards Acceptable Resolutions

Many examples of successful dialogues between agencies that resulted in timely divestitures in each jurisdiction were mentioned during the interviews. The potential to reach such solutions is enhanced by ongoing conversations as the parties discuss and negotiate with each agency. For example, in the Lafarge/Blue Circle transaction, the Bureau cooperated extensively with the FTC in all aspects of the review, and especially at the remedy stage. In the end, the remedy sought in Canada resolved problems in Canada and the U.S. where concurrent orders are likely to apply over the same assets.

9. Centre of Expertise on International Cooperation

Staff responsible for an agency's international cooperation activities should be that agency's experts in international cooperation and joint enforcement practices. They should be in a position to assist case officers through their knowledge of laws, policies, practices and personnel in other jurisdictions. They should be the "knowledge experts" when it comes to agreements and should advise officers with regard to what information they can and cannot share.

These "knowledge experts" facilitate the development of relationships required for effective international cooperation and should be seen as partners in effective multi-jurisdictional reviews.

Good working relationships between the international group and enforcement officers are essential. Regular formal meetings and appropriate discussions on specific case files help to develop a culture of cooperation.

Summary of Observations

Chapter 10

The following is a summary of the key observations of the authors resulting from the research and analysis described in the previous chapters. The observations are grouped thematically into areas that naturally emerged during the final analysis.

Communications with filing parties

Early and on-going communications with parties and their lawyers concerning a proposed or actual transaction and with the legal and business communities on merger issues in general is important.

1) Pre filing

There was concern expressed by members of the Bar during interviews held in the winter of 2000 that managers and other senior Mergers Branch staff were not seen as being as consistently available as they had been in the past to meet with parties prior to filing. Such meetings are potentially very useful because they allow for discussion of the nature of the potential merger and give parties and the Branch the opportunity to narrow the issues prior to filing and to focus submissions and information requirements at the earliest moment. An inherent result is the potential to shorten the subsequent period required for review.

The Office of Fair Trading in the United Kingdom has established a process for providing confidential guidance and informal advice for offering useful guidance and establishing a more visible and structured pre-filing consultation process.

2) Filing Requirements

There is a need to clarify a number of procedural matters concerning the use of the long-form filing since there are concerns that assembling the information required can be a major endeavour and, in some instances, certain information may not be relevant to the matter at hand. As currently worded, the requirements of the long form are not always clear to parties and their lawyers.

Canadian lawyers who were interviewed expressed the view that there is a need to clarify the language in the *Procedures Guide*[90] describing in what instances the long form will be required. There was increased concern that the long form will be required more frequently than it was in the past and that it may be requested some time after a short form has been submitted.

A verification of records demonstrated that since the implementation of the regulations, there were long forms filed in 5 cases in 1999-2000 and long forms filed in 7 cases in 2000-2001.

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[90] Procedures Guide. *Notifiable Transactions and Advance Ruling Certificates under the* Competition Act. May 1, 2000.

3) Contact Person

By informing counsel immediately upon assignment of a file of the name and telephone number of the officer responsible, the Branch creates the vehicle for an early dialogue with that officer. This also enables the early identification of additional information for the Branch if necessary, and the potential to quickly narrow the issues.

4) Technical Advice

Lawyers must be able to rely on receiving timely, accurate and consistent advice from the MNU regarding issues related to notification.

There would be clear benefits for the Mergers Branch and specifically the MNU from the creation of a database of interpretations, opinions and advice with the possibility of placing responses to frequently asked questions on the Bureau Web site.

The Assistant Director of the U.S. Federal Trade Commission's Pre-merger Notification Office (PNO) has created a "best practice" for filing processes, triage, communicating policies and procedures with "frequent filers." In addition, a senior U.S. counsel has developed a database that contains interpretations related to all sections of the Hart-Scott-Rodino provisions. This type of user-friendly database is useful, cost-effective and ensures consistency of information and advice.

The MNU intends to meet with "frequent filers" on a regular basis.

Such meetings were held in January 2001 in various Canadian cities to initiate a dialogue with stakeholders related to filing requirements. Staff of the MNU also met with the Director of the PNO at the FTC to gain additional insights into filing processes at the FTC.

5) Completing a Filing

It is essential that information be received by the Mergers Branch in a timely fashion.

Counsel for merging parties should be reminded to send all merger filing material to the MNU. Failure to send material directly to the MNU can lead to delays in notifying counsel that the filing is complete and delays in the progress of the review.

6) During Review

When the Mergers Branch keeps parties informed of developments and issues related to a file as they arise, lawyers are in a better position to address matters in a timely and efficient manner.

Efficiency and timeliness can be improved if information requests (particularly those of a substantial nature) and section 11 orders are discussed with counsel. Such discussion enables parties and their lawyers to better understand the nature, format and intent of information requirements. For example, an information request might include a requirement for information that has already been produced for another jurisdiction but in a different format. This format might be acceptable for submission to the Bureau. With the increase in the number of cross-border mergers and the consequent requirement for merging parties to file in many jurisdictions, it is important to consider the most effective way to obtain information from parties who are responding, often simultaneously, to information requirements in multiple jurisdictions.

The U.S. Federal Trade Commission and the U.S. Department of Justice announced in April 2000 a formal process whereby staff "routinely schedule second request conferences early in the investigation in which key issues will be identified and, hopefully, an agreed upon plan for the investigation put in place."[91] In addition, "staff attorneys are now instructed to convene a 'second request conference' with parties to a transaction within five business days after issuance of the second request, unless otherwise agreed."[92] Were the Branch to consider such a process, many issues related to legislated waiting periods and service standards would require careful consideration.

7) Feedback leaflets

There is a need to review the content of the feedback leaflets. The cards provide an excellent picture to managers and staff of stakeholder views, levels of satisfaction or dissatisfaction and appreciation of particular practices. It was found that the cards, as currently worded, do not provide a complete range of targeted information necessary for stakeholders to rate specific areas of performance. The cards provide important information related to timing and deadlines but very little, if any, related to economic considerations, client service, etc. Additional questions targeted to these areas would be of considerable value to the Mergers Branch in gathering, on a systematic basis, timely and useful feedback from clients on all key areas of performance.

A higher rate of return may be achieved if the Bureau instituted a process to ensure the anonymity of the sender. It was found by the authors that some stakeholders do not complete the cards when they have a complaint as they are looking for a greater degree of anonymity.

A new process has been instituted whereby the Compliance and Coordination Directorate receives all feedback leaflets and provides regular reports to the Merger Branch. The card is also being reviewed and will be modified to extract more meaningful information from stakeholders.

8) Public Communication

Canadian counsel expressed the view that it is important wherever possible that the Bureau make as much information available as possible to the legal and business communities on decisions, major files, interpretations of various points of law, policies and procedures. This is particularly important given the relatively few cases that result in Competition Tribunal proceedings. This information enables members of the bar to better understand the approach and position of the Branch and to better serve their clients.

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[91] Richard G. Parker, then Director, Bureau of Competition, Federal Trade Commission, in remarks to the American Bar Association in April 2000.

[92] *Ibid.*

The Bureau's Web site is seen as a source of valuable information. Some of the documents are not available, however, in downloadable format.

The Bureau is in the process of reviewing its website to address these and other issues.

The Australian Competition and Consumer Commission regularly publishes brief summaries of important cases and interpretations. Canadian and foreign lawyers find that these provide useful guidance and clarification of the law. The U.S. Federal Trade Commission and U.S. Department of Justice also regularly publish speeches and studies related to important cases, interpretations and undertakings. The U.K. Office of Fair Trading has a practice of publishing working papers on particular subjects.

In Canada, lawyers see value in knowing about cases that were not opposed and would like "no- action" letters to be more detailed. The news releases and back grounders the Civil Matters Branch produced for two cases (ADLS and Autobody) are, according to members of the bar, good examples of informative and educational Bureau communications. Documentation prepared following reviews in the bank transactions were also seen as useful.

Stakeholders recognize the need, however, in view of resource constraints, to balance their need for information with the Bureau's primary role of reviewing mergers in a timely manner.

Process

1. **Triage** - One key to an effective review process is the ability to quickly assess the review requirements of filings with the Branch, to do an effective triage to identify those requiring little review and those posing serious competition issues.

The Mergers Branch recently announced the creation of the Merger Notification Unit, which is headed by a senior officer and now includes several officers. This is seen by the authors as a very positive step in increasing consistency and timeliness and the adoption of a "best practice".

Merger notification files are now assigned to officers whether or not the filings are considered complete. This enables the officer to begin the review earlier, separates the technical question of the completeness of the filing from the review itself and, thus, enables the officer to have an early dialogue with parties, when required.

Files are now assigned to officers "electronically" rather than being routed by hand. This has resulted in a decrease in the time taken to assign cases thereby permitting the review to begin more quickly.

There were comments during the interviews with the bar in early 2000 about delays in reviewing cases. While most delays related to complex and very complex cases (and those having a multi-jurisdictional dimension), it was also the experience that the review of non-complex transactions was slowing down. This was attributed to increases in filings, staff turnover, and the increased complexity of the cases and globalization.

The MNU, in addition to handling prenotifications and requests for advance ruling certificates, has recently been made responsible for classifying files (as non-complex, complex or very complex) and handles many of the non-complex cases. Once fully operational and established, this change should prove beneficial in many ways:

- *more consistency for non-complex files;*
- *consistent and sound classification of transactions; and*
- *valuable and consistent training for new officers.*

2. **Service Standards** - There is a need to review the service standards regime and the manner in which it is administered. Differences between service standards and legislated time periods are a source of confusion for clients and definitions of complexity are too broad and need to be refined.

There were many references made to the 2-stage process and 30-day waiting periods in the U.S. and E.U. Many suggested that the Bureau might consider, over the longer term, a system which more closely resembles that of the U.S.

Most agreed that the service standard of 5 months in the Bureau for communicating a decision to parties on a very complex case is acceptable and closely aligned with the legislated time in the EU and the time period recommended by ICPAC.

3. **Legal Support** - The Department of Justice provides a dedicated lawyer who is responsible for providing timely advice about notification. Having a dedicated individual as well as a back-up when this person is away has resulted in consistent and timely advice to attorneys.

The advice provided by Justice to the MNU is currently not available in easily accessible electronic format. Conversion of paper and electronic documents to one consistent format would further enable the Department of Justice Canada and the MNU to provide consistent and timely advice about prenotification.

It is recognized that early involvement of lawyers and economists on cases is essential for ensuring that the theory of a case is developed early. This also ensures consistency as the case develops.

4. **Program Support** - When developing case teams, the inclusion of program officers has proven successful in cost-effectively distributing tasks among team members. In the U.S., career support personnel and paralegals are used extensively for tasks such as checking

compliance with second requests, handling documents and preparing exhibits for trial books.

5. **Case Assessment** - Post-mortems on cases and annual systematic planning are seen as key to ensuring that the merger review system is effective, to improving turnaround times and economic analysis, and being prepared to deal with files in evolving markets and industries. Lessons learned, as well as having a vision of the future, are considered worthwhile investments for antitrust agencies to continue to be effective in the medium to long term.

The U.S. Federal Trade Commission's Compliance Division interacts with attorneys early in the merger review process and later monitors compliance with orders and looks for violations of the Hart-Scott-Rodino rules. The Bureau of Economics brings in academics and business people to brainstorm on emerging issues in recognition of the value of scanning the environment and planning ahead.

Legislative Amendments

There is a need to examine whether the current legislation supports the growing need, crucial to an effective review process, to exchange merger information with other jurisdictions.

The Bureau should explore the use of waivers, which are described in Chapters 5 and 9 of this report, and are seen as effective both for agencies and parties.

In view of the limited scope for the enforcement of undertakings, there is growing consensus that legislation should provide a process for registering consent agreements with the Competition Tribunal.

Training and Development

An effective training plan for staff who do merger review should include the Merger Enforcement Guidelines, administrative processes and filing requirements.

External speakers are seen as valuable and inexpensive sources for learning. Many suggested the Bureau should not restrict its use to nationals, but should invite experts from other jurisdictions and areas of expertise that might provide a broader perspective for managers and staff.

The Bureau's rotation and mentoring programs are seen as effective and, when used consistently, provide great benefit to employees. Rotation can be expanded to include rotation within the Mergers Branch from one area or senior officer to another. For example, a new officer could begin in the Merger Notification Unit, rotate to another division and be matched with a mentor.

Personal training plans would be beneficial to ensure that officers, over the course of their careers in the Bureau, benefit from systematic development and feedback.

Ongoing Process Improvement

Finally, the authors also recommend that the Bureau, having obtained a substantial amount of baseline information related to the merger review process through this benchmarking initiative, re-examine the state of merger review in two years time.